No. 8843

United States Circuit Court of Appeals

For the Ninth Circuit.

SWIFT AND COMPANY, a Corporation,
Appellant,

vs.

HARRY J. GRAY,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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BROBECK, PHLEGER & HARRISON,
Crocker Bldg., San Francisco, Calif.;
T. L. SMART, Esq.,
60 California St., San Francisco, Calif.,
Attorneys for Appellant.

JOHN M. WELSH, Esq.,
BUTLER, VAN DYKE & HARRIS,
Capital National Bank Bldg.,
Sacramento, Calif.,
Attorneys for Appellee.

In the Superior Court of the State of California,
in and for the County of Sacramento.

No. 53148 Dept. 2

HARRY J. GRAY,
Plaintiff,

vs.

SWIFT AND COMPANY, a Corporation,
Defendant.

COMPLAINT

Plaintiff complaining of defendant, for cause of action alleges:

I.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in the City

of Chicago, State of Illinois, and qualified to do and doing business in the State of California.

II.

That for some time prior to the 12th day of October, 1934, plaintiff had been an employee of defendant in its packing plant in the City of South San Francisco, State of California; that on or about the 16th day of October, 1934, the defendant, in the presence and hearing of, and to, sundry persons in the County of San Mateo, spoke of and concerning the plaintiff the following false and slanderous words, to-wit:

"Harry (meaning the plaintiff) is short in his accounts with the Company. He has been taking the Company's money. He has collected money of the Company and has not turned it in." [1*]

That the words aforesaid, to-wit, "Harry is short in his accounts with the Company", meant, were intended by the defendant at said time and place to mean, and were understood by said sundry persons to whom said words were spoken to mean, that the plaintiff has been guilty of embezzling the funds of defendant entrusted to his care as an employee of defendant;

That the words aforesaid, to-wit, "He has been taking the Company's money", meant, were intended by the defendant at said time and place to mean, and were understood by said sundry persons to whom said words were spoken to mean, that the

*Page numbering appearing at the foot of page of original certified Transcript of Record.

plaintiff had been guilty of embezzling the funds of defendant entrusted to his care as an employee of defendant;

That the words aforesaid, to-wit, "He has collected money of the Company and has not turned it in", meant, were intended by the defendant at said time and place to mean, and were understood by said sundry persons to whom said words were spoken to mean, that the plaintiff had been guilty of embezzling the funds of defendant entrusted to his care as an employee of defendant.

III.

That the said publications were, and each of them was, false and defamatory, and that in consequence thereof plaintiff was defamed and slandered, was unable to obtain employment within the City and County of San Francisco, or within the County of San Mateo all to plaintiff's damage in the sum of Two Thousand ($2,000.00) Dollars.

IV.

That by reason of the speaking and publication of the said false and defamatory words, plaintiff has been injured in his reputation, has suffered great and grievous mental pain and suffering, and has been generally damaged in the sum of Fifty Thousand ($50,000.00) Dollars. [2]

Wherefore, plaintiff prays for judgment against the said defendant in the sum of Fifty-two Thousand ($52,000.00) Dollars, for his costs of suit, and

for such other and further relief as may be proper in the premises.

JOHN M. WELSH
BUTLER, VAN DYKE & HARRIS
Attorneys for Plaintiff.

State of California
County of Sacramento—ss.

John M. Welsh, being first duly sworn, deposes and says:

That he is one of the attorneys of record in the above entitled action, representing the plaintiff, and that as such he makes this affidavit of verification for and on behalf of said plaintiff, for the reason that said plaintiff is without the County in which said attorney has his offices; that he has read the foregoing Complaint and knows the contents thereof and that the same is true of his own knowledge, except as to such matters as may be therein stated upon information or belief, and as to those matters, if any there be, he believes the same to be true.

JOHN M. WELSH

Subscribed and sworn to before me this 11th day of October, 1935.

[Seal] A. E. WEST
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed Oct. 11, 1935. [3]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO UNITED STATES DISTRICT COURT

To the Honorable, the Superior Court of the State of California, in and for the County of Sacramento:

The petition of Swift and Company respectfully represents; shows and alleges as follows, to-wit:

I.

Your petitioner is the defendant in the above entitled suit or action. Said suit, as appears from the plaintiff's complaint on file therein, is of a civil nature of law, brought by plaintiff to recover judgment against your petitioner in the sum of Fifty-two Thousand Dollars ($52,000.00) and costs of suit, which claim your petitioner wholly contests and denies and your petitioner alleges that the amount involved in said action, exclusive of interest and costs, exceeds the value of Three Thousand Dollars ($3,000.00).

II.

Your petitioner, the defendant, Swift and Company was at the time of the commencement of this action and it ever since has been, and it was at all of the times herein and in the complaint mentioned, and still is, a corporation, incorporated and existing under the laws of the State of Illinois and a citizen and resident of said State and not a resident of the State of California. [4]

That the said plaintiff was at the time of the commencement of this action and he ever since has been and is now, a citizen and resident of the State of California and a resident of the Northern District of California.

III.

Service of summons was made in said suit on your petitioner on the 23rd day of December, 1935, in the County of San Mateo, State of California, and your petitioner is not required by the laws of the State of California or by the rules of the above entitled court in which said suit is brought, to answer or plead to the complaint of plaintiff therein until the 22nd day of January, 1936.

IV.

Your petitioner files and offers herewith its bond, with good and sufficient surety, for its entering in the Northern Division of the United States District Court in and for the Northern District of California, within thirty days from the date of filing this petition for removal of said cause, a certified copy of the record in said suit and for paying all costs that may be awarded by said district court, if said Court shall hold that said suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays this Honorable Court to accept said bond as good and sufficient and to make its order for the removal of said cause to the Northern Division of the United States District Court in and for the Northern District of Cali-

fornia, pursuant to the Act of Congress, in such cases made and provided and for such other and further order as may [5] be proper and to cause the record herein to be removed to the said District Court and that no further or other proceedings be had in said cause in said Superior Court of the State of California, in and for the County of Sacramento.

And your petitioner will ever pray.

T. L. SMART
GERALD M. DESMOND

State of California,
City and County of San Francisco—ss.

T. L. Smart, being duly sworn, deposes and says;

That he is attorney for the petitioner, Swift and Company, a corporation named in the foregoing petition; that the reason this affidavit is not made by an officer of said petitioner but is made by affiant is that there is no officer of the petitioner in the State of California, where affiant resides; that affiant has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters which are therein stated on information and as to those matters that he believes them to be true.

T. L. SMART

Subscribed and sworn to before me this 8th day of January, 1936.

KATHRYN E. STONE
Notary Public in and for the City and County of San Francisco, State of California.

Received copy of the within Petition for Removal of Cause to United States District Court this 10th day of January, 1936.

JOHN M. WELSH
BUTLER, VAN DYKE &
HARRIS
Attorneys for Plaintiff

[Endorsed]: Filed Jan. 15, 1936. [6]

[Title of Superior Court and Cause.]

UNDERTAKING ON REMOVAL OF CAUSE

Know All Men by These Presents: That Maryland Casualty Company, a corporation organized and existing under the laws of the State of Maryland for the purpose of becoming surety on bonds required by law, and which said corporation has complied with the laws of the State of California with reference to doing and transacting business in the said State of California, is held and firmly bound unto Harry J. Gray, the plaintiff in the above entitled action, in the penal sum of Five Hundred Dollars and no/100 ($500.00) lawful money of the United States for the payment hereof well and truly to be made unto the said Harry J. Gray, his successors, representatives and assigns, the said Maryland Casualty Company binds itself, its successors, representatives and assigns firmly by these presents:

Under These Conditions, that Whereas, Swift & Company, an Illinois Corporation, defendant above

named, having petitioner, or is about to petition the Superior Court of the State of California in and for the County of Sacramento for the removal of a certain cause pending, wherein said Harry J. Gray, is the Plaintiff, and the said Swift & Company, an Illinois Corporation, is the Defendant, to the Northern Division of the District Court of the United States for the Northern District of California, for further proceedings on grounds in the said petition set forth, and that all further proceedings in said action in said Superior Court of the State of California in and for the County of Sacramento be stayed;

Now, Therefore, if said petition Swift & Company, an Illinois [7] Corporation, shall enter in the said District Court of the United States for the Northern District of California, Northern Division, within thirty days from the filing of the petition for the removal of this cause to the said District Court, a certified copy of the record of the above entitled suit or action, and shall well and truly pay, or cause to be paid, all costs that may be awarded therein by said District Court of the United States, if such court shall hold such suit was wrongfully or improperly removed thereto, and shall appear and enter special bail in said suit if special bail was originally requisite, then this obligation shall be void; otherwise it shall reman in full force and effect.

In Witness Whereof, said Maryland Casualty Company has caused these presents to be signed

and its corporate seal to be hereto affixed this 8th day of January, 1936.

MARYLAND CASUALTY
COMPANY
By N. C. ANDREWS,
Attorney-in-fact

The within undertaking is hereby approved this 15th day of Jany., 1936.

PETER J. SHIELDS
Judge of the Superior Court

[Endorsed]: Filed Jan. 15, 1936. [8]

[Title of Superior Court and Cause.]

NOTICE OF PETITION FOR REMOVAL

To the plaintiff above named and to John M. Welsh, Esq. and Messrs. Butler, Van Dyke and Harris, Attorneys for Plaintiff:

You and each of you will please take notice that Swift and Company, the defendant in the above entitled action, will on Wednesday, the 15th day of January, 1936, at 10 o'clock A. M., petition the above entitled Court, at the Court Room thereof, in the County Court House in Sacramento, County of Sacramento, State of California, to remove said cause to the Northern Division of the United States District Court, in and for the Northern District of California, by filing a petition and bond, copies of which are hereto attached and made a part

hereof, reference to which is hereby expressly made for further particulars.

Dated 10th day of January, 1936.

T. L. SMART
GERALD M. DESMOND
Attorneys for defendant and Petitioner.

Received copy of the within notice of Petition for Removal (with copy of Petition and bond for removal attached) this 10th day of January, 1936.

JOHN M. WELSH
BUTLER, VAN DYKE & HARRIS
Attorneys for Plaintiff

[Endorsed]: Filed Jan. 15, 1936. [9]

In the District Court of the United States for the Northern District of California.

No. 1394-S

HARRY J. GRAY,

Plaintiff,

vs.

SWIFT AND COMPANY, a Corporation,

Defendant.

ANSWER TO COMPLAINT

Comes now the defendant above named and for its answer to the complaint of plaintiff on file in

the above entitled action, admits, denies and alleges as follows:

I.

Answering Paragraph I of said complaint, defendant admits each and every allegation therein contained.

II.

Answering that portion of Paragraph II of said complaint, commencing with the word "That" on Line 20, Page 1, to and including the word "California" on Line 22, Page 1, defendant admits the allegations of said portion of Paragraph II.

Answering that portion of Paragraph II, commencing with the word "that" on Line 22, Page 1, to and including the word "defendant" on Line 18, Page 2, defendant denies that it or any agent, servant or employee of it at any time spoke of or concerning the plaintiff or otherwise or at all the words or any of them that plaintiff alleges were spoken by defendant in said portion of Paragraph II.

Further answering said portion of Paragraph II (at all times denying that said words were spoken or published) defendant denies that said words or any thereof meant or could have been understood to mean that plaintiff had been guilty of embezzling funds from defendant or from anyone whomsoever or at all.

III.

Answering Paragraph III of said complaint, defendant denies that it or any agent, servant or em-

ployee of it spoke or published said words or any thereof, and further denies that plaintiff was at all defamed or slandered, and further denies that plaintiff was unable to obtain employment within the City and County of San Francisco or within the County of San Mateo or any other place by [10] reason of any act whatever on the part of defendant or any agent, servant or employee of defendant.

Further answering said Paragraph III, defendant denies that plaintiff was damaged in the sum of $2,000.00, and/or in any sum or sums whatever, or at all.

IV.

Answering Paragraph IV of said complaint, defendant denies that it or any agent, servant or employee of it spoke or published said words or any thereof, and further denies that plaintiff has been injured in reputation or otherwise or that plaintiff has suffered mental pain or suffering of any kind, and further denies that plaintiff has been damaged generally or otherwise in the sum of $50,000.00, and/or in any sum or sums whatever, or at all.

As a Second, Separate and Further Defense to the Alleged Cause of Action Set Forth in Said Complaint, defendant alleges:

I.

That the said words which plaintiff alleges were spoken by plaintiff and which plaintiff alleges were false and defamatory were and are, each and all of them true.

II.

That the said words did not mean nor could they be understood to mean that plaintiff had been guilty of embezzling funds of defendant or any person whomsoever.

As a Third, Separate and Further Defense to the Alleged Cause of Action Set Forth in Said Complaint, defendant alleges:

I.

That at the time said words which plaintiff alleges to be [11] slanderous were spoken, if in fact they were spoken or published, plaintiff was an employee of defendant acting in the capacity of salesman, and in said capacity it was the duty of plaintiff to collect money due and owing to defendant from customers of defendant.

II.

That at the time said words were spoken, if in fact they were spoken, the books and records of defendant reflected a shortage in the plaintiff's return of moneys collected from customers of defendant for defendant; that the said alleged false or alleged defamatory words, if spoken at all, were spoken by an employee or agent of defendant to another employee or agent of defendant or to employees, agents or customers of defendant or were spoken in response to inquiries of customers of defendant; that the said words, if spoken, were spoken during the course of an investigation of defendant's records of plaintiff's accounts with

defendant when said records reflected a shortage as hereinbefore stated; that it was during the investigation of this shortage that said words were spoken, if spoken at all, by defendant or some agent or employee of defendant and at said time the party speaking was a person interested in the said investigation and at said time the persons to whom the words were spoken, if in fact they were spoken, were agents, employees or customers of defendant who were also persons interested in said investigation and in the said communication, if said communication were in fact made.

III.

That at the time said words were spoken, if spoken at all, defendant had reasonable and probable cause for believing and did believe that plaintiff was short in his accounts with defendant, and if said words were spoken by defendant or some agent, servant or employee of it, they were spoken during the investigation here- [12] inbefore referred to and without any malice whatsoever toward plaintiff but as fair and impartial comments made in good faith upon a matter arising out of the relationship of employer and employee and were made only to a person or persons interested in the said communication.

As a Fourth, Separate and Further Defense to the Alleged Cause of Action Set Forth in Said Complaint, defendant alleges:

I.

That if said words which plaintiff alleges to be false and defamatory were in fact spoken by defendant or any agent, servant or employee of defendant, said words were spoken at a time more than one year prior to the commencement of this action, and plaintiff's action is therefore barred by the provisions of Subdivision 3 of Section 340 of the Code of Civil Procedure of the State of California.

Wherefore, defendant prays that plaintiff take nothing whatever by his said action, and that it may be hence dismissed with its costs of suit incurred herein.

T. L. SMART
GERALD M. DESMOND
Attorneys for Defendant.

State of California
County of San Mateo—ss.

J. A. White, being duly sworn, deposes and says: That he is an officer, to-wit, General Manager of the defendant corporation; that he makes this affidavit for and on behalf of said defendant corporation; that he has read the foregoing Answer to Complaint and knows the contents thereof; that the same is true [13] of his own knowledge except as to those matters which are therein stated on in-

formation or belief and as to those matters he believes it to be true.

J. A. WHITE

Subscribed and sworn to before me this 15th day of June, 1936.

[Seal] J. J. HEARNE

Notary Public in and for the County of San Mateo, State of California.

[Endorsed]: Filed Jun. 22, 1936. [14]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of One Thousand Seven Hundred and Fifty Dollars ($1750.00).

CLARKE E. WAYLAND

Foreman

[Endorsed]: Filed March 4, 1938. [15]

In the District Court of the United States for the Northern District of California.

No. 1394-S.

HARRY J. GRAY,

Plaintiff,

vs.

SWIFT AND COMPANY, a Corporation,

Defendant.

JUDGMENT

This cause having come on regularly for trial on the 1st day of March, A. D. 1938, being a day in the October 1937 Term of said Northern Division of said Court, before the Court and a Jury of twelve men duly impaneled and sworn to try the issues joined herein, John M. Welsh and B. F. Van Dyke, Esqrs., appearing as attorneys for Plaintiff, and Maurice E. Harrison, Moses Lasky and T. L. Smart, Esqrs., appearing as Attorneys for the Defendant; the trial having been proceeded with on the 1st, 2nd, 3rd and 4th days of March, 1938, in said Term, and evidence, oral and documentary, upon behalf of the respective parties having been introduced and closed and the cause after argument of the Attorneys, and the instructions of the Court having been submitted to the Jury, the Jury having subsequently rendered the following verdict, which was Ordered recorded, to-wit:

"We, the Jury, find in favor of the Plaintiff and assess the damages against the defend-

ant in the sum of One Thousand Seven Hundred and Fifty Dollars ($1750.00) Dollars.

CLARKE E. WAYLAND,
Foreman."

It Is Therefore Ordered and Adjudged that the Plaintiff, Harry J. Gray, do have and recover of and from the defendant, Swift & Company, a corporation, a judgment in the sum of One Thousand Seven Hundred and Fifty ($1750.00) Dollars and for costs taxed in the sum of $126.35.

Entered this 1st day of March, 1938.

WALTER B. MALING,
Clerk,
By F. M. LAMPERT,
Deputy Clerk. [16]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable A. F. St. Sure, Judge of the United States District Court, in and for the Northern District of California:

Your petitioner, Swift and Company, a corporation, respectfully shows:

1. Petitioner is the defendant in the above-entitled cause.

2. Said cause is an action at law.

3. A final judgment was entered in said cause against petitioner and in favor of the plaintiff Harry J. Gray on the 4th day of March, 1938.

4. Petitioner feels itself aggrieved by said judgment for the reasons specified in the assignment of errors which is filed herewith and desires to take an appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit; under and in accordance with the laws of the United States, in such cases made and provided.

5. Petitioner desires that said appeal shall operate as a supersedeas.

Wherefore, petitioner prays that an appeal may be allowed to it from the said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, that a citation shall issue as provided by law, that an order be made fixing the amount of cost and supersedeas bond or undertaking which petitioner shall give and furnish upon said appeal; that upon the giving of such [17] security a supersedeas shall be allowed and all further proceedings in this Court shall be suspended and stayed and the operation of the judgment shall be suspended until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit; and that a transcript of the record, proceedings and papers on which said judgment was based be made and duly authenticated and sent to said United States Circuit Court of Appeals for the Ninth Circuit; and that such other or process issue as may cause the errors complained of to be

corrected by said United States Circuit Court of Appeals.

Dated: April 1, 1938.

MAURICE E. HARRISON
T. L. SMART
MOSES LASKY
BROBECK, PHLEGER & HARRISON
Attorneys for Petitioner Swift and Company, a corporation.

[Endorsed]: Filed Apr. 1, 1938. [18]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING PETITION FOR APPEAL

State of California,
City and County of San Francisco—ss.

George Helmer, being first duly sworn, deposes and says:

That he is a citizen of the United States and a resident of the City and County of San Francisco, State of California; that he is over the age of 18 years and not a party to the above-entitled cause;

That Messrs. Brobeck, Phleger & Harrison, and T. L. Smart, Esq., the attorneys for the defendant, have their offices in the City and County of San Francisco, State of California; that John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, the

attorneys for the plaintiff, have their offices in the county of Sacramento, State of California, in the Capital National Bank Building in the City of Sacramento;

That on the first day of April, 1938, in the City and County of San Francisco, affiant deposited in the United States mail a sealed envelope, with postage thereon fully prepaid, addressed to John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, Capital National Bank Building, Sacramento, California; that said envelope contained a copy of the attached Petition for Appeal; that there is a daily service by United States mail at the place so addressed and that there is a regular communication by mail between said place of mailing and the place so addressed.

GEORGE HELMER

Subscribed and sworn to before me this first day of April, 1938.

[Seal] EUGENE P. JONES

Notary Public in and for the City and County of San Francisco, State of California. [19]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND FOR COST AND SUPERSEDEAS BOND.

Upon the petition for appeal filed by defendant, and on consideration of the assignment of errors filed therewith, and upon motion of counsel for the petitioner,

It Is Hereby Ordered that an appeal be and it is hereby allowed as prayed for from the judgment entered herein on March 4th, 1938, upon the petitioner filing herein a bond in the sum of $2500.00, conditioned as required by law and the *fules* of Court, said bond to operate as a supersedeas as well as a cost bond.

It Is Further Ordered that upon the filing of said bond, all further proceedings in this Court shall be suspended and stayed and the operation of the judgment shall be suspended until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

It Is Further Ordered that a certified transcript of the record and all proceedings be transmitted to said United States Circuit Court.

Dated: April 1, 1938.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Apr. 1, 1938. [20]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

The defendant Swift and Company, a corporation, files herein the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in the above-entitled cause from the judgment of this Court, [21] entered on the.....day of March, 1938.

I.

The Court erred in denying the motion made by the defendant at the close of plaintiff's case for a nonsuit. The motion so made was as follows: "The defendant in this case moves for a judgment of nonsuit, or dismissal, on the following grounds: First, that it appears affirmatively from the evidence that the utterances complained of are privileged in character, and that under the provisions of Section 47 of the Civil Code of California and under the Common Law, no cause of action arises therefrom; inasmuch as it appears by uncontradicted testimony that the only communications here made were communications without malice to a person interested therein by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent; or, three, who is requested by the person interested to give the information."

The said motion was thereupon denied by the Court, to which ruling counsel for defendant then and there excepted.

II.

The Court erred in denying a motion made by the defendant at the close of all evidence for a directed verdict in favor of the defendant. The said motion was made as follows: "I move, if the Court please, that the jury be directed to return a verdict for the defendant on the ground that it appears by uncontradicted testimony that the statements here

complained of are privileged in character and that it appears without [22] contradiction that there was no actual malice, and particularly on the ground that it appears that the statements complained of were made by one who is interested in the communication to another person interested in the communication and were made by a person interested and who was requested by the person interested to give the information.

"I assign as an additional ground for a directed verdict for the defendant in this case that the uncontradicted evidence shows that the communication here involved is a privileged communication having been made by a person interested therein to another interested therein, and on the further ground that it was made in response to an inquiry, and on the ground that the uncontradicted evidence shows absence of express malice.

"And further, on the separate ground that there is no proof showing, or tending to show, that the persons who are alleged to have made the statements had authority so to do, or that they made the statements in the course of their employment, or that either of them made the statements under the authority of the defendant."

The Court denied said motion for a directed verdict, to which ruling defendant by its counsel then and there excepted.

III.

The Court erred in denying the defendant's motion for judgment notwithstanding the verdict, said

motion being made before judgment had been entered upon the verdict. The motion was as follows: "I move for judgment in favor of the defendant, notwithstanding the verdict, on the grounds stated [23] in support of my motion for a directed verdict, to-wit, that the uncontradicted evidence in this case shows that any communications made were those of a privileged nature, by a person interested therein to another person interested therein, without malice; secondly, on the ground that any communications made were not made by the defendant or by anyone authorized by the defendant, and that no communication was made by anyone within the scope of his authority."

The Court denied said motion for judgment notwithstanding the verdict, to which ruling the defendant then and there excepted.

IV.

The Court erred in entering judgment in favor of the plaintiff and against the defendant upon the verdict.

V.

The Court erred in giving to the jury, during the course of the charge to the jury, the following instruction which was Plaintiff's Requested Instruction No. 6, to-wit:

> "Slander is a false and unprivileged publication other than libel which charges any person with crime or tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general

disqualification in those respects which the office or other occupation peculiarly requires, or of imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profits, or which by natural consequence causes actual damage."

[24]

To said instruction the defendant, at the conclusion of the Court's charge and in the presence of the jury and before the jury had retired to deliberate on its verdict, objected on the following grounds:

"(a) The complaint raises no issue as to any type of slander except an alleged accusation of a crime, namely, embezzlement. There is no issue raised as to any other type of slander.

"(b) There is no evidence in the case of any alleged utterances which tend to injure the plaintiff in respect of any office, trade, profession or business, particularly with respect to imputing any general disqualification."

and then and there excepted to the said instruction.

VI.

The Court erred in giving to the jury, during the course of the charge to the jury, the following instruction which was Plaintiff's Requested Instruction No. 10, to-wit:

"I instruct you that a man intends the natural consequence of his acts. If, therefore, the jury believes and finds from the evidence that

the natural consequences of the publication complained of was to defame and injure plaintiff in his reputation and character you may properly infer such was the intention of defendant."

To said instruction the defendant, at the conclusion of the Court's charge and in the presence of the jury and before the jury had retired to deliberate on its verdict, objected on the following grounds: [25]

"(a) It is a question for the Court and not the jury what the meaning and consequences of words are. (See defendant's Proposed Instruction No. 5, and authorities there cited.)

"(b) The present is a case of qualified privilege (see defendant's Proposed Instructions Nos. 17, 21, 24, 25 and authorities there cited). In such a case malice must be proved, and there is no presumption of intention or malice inferred (Civil Code, Section 48).

"(c) Even if this were not a case of qualified privilege, which it clearly is, it would be improper to charge that an intent might be presumed because, in such a case, intent would be immaterial, and the requested charge would be misleading. (36 Corpus Juris, p. 1214, Section 162.)"

and then and there excepted to said instruction.

VII.

The Court erred in giving to the jury, during the course of the charge to the jury, the following

instruction which was Plaintiff's Requested Instruction No. 11, to-wit:

> "In an action for slander, the law implies some damage from the uttering of actionable words, and the law further implies that the person using the actionable words intended the injury the slanderer is claimed to effect, and in this case if you find for the plaintiff upon that part of the complaint alleging slander you will determine from all the facts and circumstances proved what damages are [26] to be given him, and in assessing the damages you are not confined to any mere pecuniary loss sustained. Physical pain, mental suffering, humiliation, and injury to the reputation of character, if proved, are proper elements of damage."

To said instruction the defendant, at the conclusion of the Court's charge and in the presence of the jury and before the jury had retired to deliberate on its verdict, objected on the following grounds:

> "(a) Defendant objects on all the grounds stated in the objection to Plaintiff's Requested Instruction No. 10; and also
>
> "(b) Upon the ground that plaintiff has already requested the instruction that it is slanderous to make a false communication which by natural consequences causes actual damage; the present requested instruction that the law implies some damages from utterances

of slanderous words is, in the circumstances, question begging;

"(c) The proposed instruction refers to physical pain of which there is no evidence and for which there may be no recovery in any event;

"(d) The requested instruction will permit recovery of damages in the nature of punitive damages for which there can be no recovery. (See defendant's Proposed Instruction No. 30.)"

and then and there excepted to said instruction.

VIII.

The Court erred in refusing to give to the jury the [27] following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 17, reading as follows:

"Sometimes remarks are made in circumstances and on occasions which the law calls 'privileged.' If a remark is made on a privileged occasion, then even though it is not true and is defamatory, nevertheless it is not regarded as slanderous, and there is no liability unless the words were spoken maliciously, that is to say, with actual malice. If a statement or remark is made without malice by a person interested therein to another person interested therein, it is a privileged publication."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury,

after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon their verdict.

IX.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 18, reading as follows:

> "If a remark, although not in fact substantiated in truth, is made in good faith and in an honest belief that it is true and without any desire or disposition to injure the party of whom it is spoken and without any spite or ill will toward him, then it is not malicious, and if the occasion is privileged, there is no liability."

[28]

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

X.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 19, reading as follows:

> "If a remark is made on a privileged occasion, the burden of proof is upon the plaintiff to establish by a preponderance of evidence that it was made with actual malice. If plaintiff fails to prove that such remark was made

with actual malice, the verdict must be for the defendant and against the plaintiff."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XI.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 20, reading as follows:

"In determining whether or not a communication to a person interested therein by one who is also interested is made without malice, malice is not to be inferred from the mere fact of communication." [29]

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XII.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 21, reading as follows:

"Where the facts and circumstances under which an alleged defamatory publication is made are undisputed, the question of privilege

is one for the Court. Even if you should find that the defendant uttered of the plaintiff the words set out in the complaint, the circumstances under which they were said are undisputed. The Court has considered the matter and instructs you that the occasions were privileged and that if the words were uttered without actual malice (if, in fact, there were any words said), then your verdict must be in favor of defendant and against the plaintiff."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XIII.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred [30] to as Defendant's Proposed Instruction No. 22, reading as follows:

"Where a plaintiff seeks to hold a corporation liable for remarks made by an employee, the corporation cannot be held responsible for the actual malice of the employee, if there was any, unless it had expressly authorized the employee to slander the plaintiff maliciously, or knowing that he uttered a slander maliciously, authorizes and approves what he said. Consequently, if the occasion of an utterance is privileged within the meaning of the instructions already given to you, a corporation cannot be

held liable for utterances of an employee unless first, those utterances were made with actual malice, and in addition, the corporation had expressly authorized the employee beforehand to make the utterance maliciously or thereafter approved of the utterance, knowing of its falsehood."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XIV.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 23, reading as follows:

"There is no evidence whatever that the defendant corporation ever expressly authorized any em- [31] ployee to utter any of the remarks referred to in the complaint or ever approved of any such utterances, and I therefore instruct you that even if some employee did utter such remarks, no actual malice can be charged to the corporation. You will therefore return a verdict in favor of defendant and against the plaintiff."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury,

after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XV.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 24, reading as follows:

> "If an employee of the defendant was sent out by the defendant to interview customers on the plaintiff's route for the purpose of checking up to ascertain what sales the plaintiff had made and what moneys he had collected, if any, then even if you should find that while engaged in that task such employee made the remarks referred to in the complaint to a customer, I instruct you that if the employee acted in good faith and in an honest belief that what he said was true and without any desire or disposition to injure the plaintiff and without any spite or ill will toward him, the remarks were privileged, and even if they were false and derogatory, [32] the defendant cannot be held guilty of slander, and the plaintiff is not entitled to recover damages because of such remarks."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XVI.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 25, reading as follows:

> "A communication, though in fact unfounded in truth, is privileged if made in good faith in the performance of any duty and with a fair and reasonable purpose of protecting the interests of the person making it or the interests of the person to whom it is made. I therefore instruct you that even if you find that the defendant uttered concerning the plaintiff the words complained of, yet if you find that those words were said in good faith in carrying out the company's business and with a fair and reasonable purpose of protecting the interests of the company, then the defendant cannot be held liable even though what was said was not well founded in fact."

To which refusal to give said requested instruction, the defendants excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had re- [33] tired to deliberate upon its verdict.

XVII.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 26, reading as follows:

"Even if you find that some employee of the defendant, while checking the plaintiff's route, made an utterance concerning the plaintiff, as he alleges in the complaint, and even if you find that the utterance was false and made with actual malice, nevertheless you cannot hold the defendant corporation liable for such remarks, if any, unless such employee had been expressly ordered beforehand to go out and make the remark or afterwards the corporation learned that such a remark had been made and approved of it with knowledge of its falsehood."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XVIII.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 27, reading as follows:

"There is no evidence whatever in this case that the defendant corporation ever expressly [34] authorized any employee to utter any of the remarks referred to in the complaint or ever approved of any such utterances, and I therefore instruct you that even if some employee did utter such remarks, no actual malice is chargeable to the corporation. Consequently,

in the event you find that such utterances, if there were any, were made on a privileged occasion as has been explained to you, your verdict must be in favor of the defendant and against the plaintiff."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XIX.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 28, reading as follows:

"Even though you find that the defendant made the statements with respect to the plaintiff alleged in the complaint, nevertheless if you further find that the defendant was interested therein and that such statements were made by the defendant in a communication, without malice, to a person interested therein, I instruct you that the publication is a privileged one and that your verdict must be for the defendant. In determining whether or not the communication is privileged, you may consider all the facts and circumstances surrounding the [35] transaction in order to determine whether or not the defendant was interested in the communication and whether or not the per-

sons to whom the communication was made were also interested therein."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XX.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 33, reading as follows:

"I instruct you that the defendant corporation, Swift and Company, cannot be held responsible for any utterances made or alleged to have been made by Mr. Harbinson. The Court finds that the evidence does not establish that Mr. Harbinson, if he made any of the alleged utterances, was acting within the course or scope of his employment."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XXI.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred [36] to as Defendant's Proposed Instruction No. 34, reading as follows:

"I instruct you that the defendant corporation, Swift and Company, cannot be held responsible for any utterances made or alleged to have been made by Mr. Gould. The Court finds that the evidence does not establish that Mr. Gould, if he made any of the alleged utterances, was acting within the course or scope of his employment."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XXII.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 12, reading as follows:

"Even if you find that the alleged remarks were made by some employee of the defendant and further that the employee had been sent out by the defendant to check the plaintiff's route, that is, to ascertain what sales had been made and what moneys had been collected by the plaintiff, nevertheless it would not be part of the employee's duties nor connected with his assignment to utter the remarks complained of, and defendant cannot be held liable on account of such remarks." [37]

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XXII-A

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 14, reading as follows:

> "The law does not hold an employer liable for every defamatory utterance of an employee. It does not hold an employer responsible for every reckless, thoughtless or even deliberate speech made by an employee concerning or relating to other persons while he is in his employer's service."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict. [38]

XXIII.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 16, reading as follows:

> "If you find that some employee of the defendant uttered the alleged derogatory remarks concerning the plaintiff, that is not enough to

make defendant responsible. If the employee who made such remarks was a salesman on a route, that fact would not by itself authorize him to speak for the defendant on the subject of the plaintiff and would not make the defendant responsible for any such remarks concerning the plaintiff, and if the employee did make such remarks in the circumstances described, they are his own responsibility."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XXIV.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 5, reading as follows:

"The meaning of the language used in an alleged defamatory publication is in the first instance a question for the Court to decide. Where language is unambiguous, it is the province of the Court to determine its construction and to deter [39] mine whether it is capable of the defamatory meaning which the plaintiff claims for it. The plaintiff claims that the defendant said of him that 'Harry (meaning the plaintiff) is short in his accounts with the company.' The Court has considered these

words, and it concludes that these words do not mean and are not reasonably capable to being understood to mean that plaintiff has been guilty of embezzling funds of the defendant entrusted to his care as an employee of defendant. I therefore instruct you that even if you find that the defendant spoke those words of plaintiff, nevertheless it cannot be guilty of slander, and you cannot render a verdict against the defendant on account of those words."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XXV.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 6, reading as follows:

"The plaintiff claims that the defendant said of him that 'He (meaning the plaintiff) has collected money of the company and has not turned it in.' The Court has considered these words, and it concludes that these words do not mean and are not reasonably [40] capable of being understood to mean that plaintiff has been guilty of embezzling funds of the defendant entrusted to his care as an employee of defendant. I therefore instruct you that even

if you find that the defendant spoke those words of plaintiff, nevertheless it cannot be guilty of slander, and you cannot render a verdict against the defendant on account of those words."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XXVI.

The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant as follows:

"Mr. Van Dyke: Q. Now, Mr. Gray, after you left Swift & Company's place of business, after this last conversation, what did you do with regard to seeking employment?

"Mr. Harrison: Now, this, I presume is offered for the purpose of showing a transaction between this witness and other persons with whom he sought employment. We object to that testimony on the ground that it is wholly incompetent, irrelevant and immaterial; it is not shown to have any connection with the alleged slanderous statements until proof is offered by these other persons the statement was made. It is hearsay testimony and has no connection with the slander charged in the complaint.

"The Court: Overruled. [41]

"Mr. Harrison: Exception.

"A. I went to Virden Packing Company and asked for employment. That is the first place I went to."

XXVII.

The Court erred in permitting the plaintiff's witness, Eugene Harbinson, to testify over the objection and exception of the defendant concerning a conversation between the proprietor of the Los Angeles Fruit Market in Burlingame and the witness, as follows:

"Q. Will you just give us the conversation you had with the lady who owned the Los Angeles Fruit Market?

"Mr. Harrison: That is objected to on the ground that it is hearsay, not binding upon this defendant.

"The Court: What is the purpose, Mr. Van Dyke?

"Mr. Van Dyke: To prove the slander.

"Mr. Harrison: We submit it does not show any authority in this witness, so the words spoken by him would not be within the scope of his authority to bind the company.

"The Court: Objection overruled.

"Mr. Harrison: Exception.

"The Court: Yes, exception noted.

"A. I went in and asked this woman if I could see the sales tags which Gray had given her on Friday. After some discussion as to

why she wouldn't let me see it, I told her that Mr. Gray was short in his accounts with the company; that I wanted to find out how much she had paid Mr. Gray on Friday."

XXVIII.

The Court erred in permitting the plaintiff's witness, [42] Eugene Harbinson, to testify over the objection and exception of the defendant concerning a conversation between one of the proprietors of Monte's Meat Market in San Mateo and the witness as follows:

"Q. Now, will you please give the conversation you had with the man at Monte's Market that you called Al?

"Mr. Harrison: Object to that, if the Court please, on the ground that it is irrelevant, incompetent, and immaterial, and hearsay and not authorized by the defendant.

"The Court: Overruled.

"Mr. Harrison: Exception.

"A. I went in and asked him if I could see the sales tag that Mr. Gray had given him on Friday. He said he did not have it with him, and he wanted to know why, and I said I was out checking Mr. Gray's route, that he had been short in his accounts with the company and that I wanted to find out the amount he had paid."

XXIX.

The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection

and exception of the defendant concerning a conversation between one Lawrence Lewin (known to the witness as "Larry") and the witness, as follows:

"Q. Now, give us the conversation with Larry?

"Mr. Harrison: Same objection already stated, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant.)

"The Court: Yes, overruled. Exception.

"Mr. Harrison: Exception. [43]

"A. I said that I wanted to see the sales tag Mr. Gray had given him on Friday. There was some discussion as to why I wanted to see it, and I told him that Mr. Gray was short in his accounts and I wanted to find out how much Larry, the owner of the store, had paid Mr. Gray, as he did not turn in his money."

XXX.

The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between the proprietor of Economy Market in Menlo Park (referred to as "Carl") and the witness, as follows:

"Q. Now, when you went there, what occurred there, what conversation took place with Carl?

"Mr. Harrison: The same objection, if the Court please,—irrelevant, incompetent and immaterial, and hearsay.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I wanted to see his sales tag that Mr. Gray had given him on Friday, and we had some discussion as to why I wanted to see it, and he said I merely wanted to compare prices that Mr. Gray had quoted him on Friday. I said, 'No,' that I was checking Mr. Gray's route, that he was short in his accounts and had not turned any money in."

XXXI.

The Court erred in permitting the plaintiff's witness, Eugene Harbinson, to testify over the objection and ex- [44] ception of the defendant concerning a conversation between one referred to as "Joe" and the witness, as follows:

"Q. What conversation took place between yourself and Joe?

"Mr. Harrison: My objection may be deemed interposed to that conversation, may it, your Honor (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant)?

"The Court: Yes, overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I asked him if I could see the sales tag for Friday that Mr. Gray had given him and that Mr. Gray was short in his accounts with the company. I wanted to find out how much money he had paid Mr. Gray."

XXXII.

The Court erred in permitting the plaintiff's witness, Eugene Harbinson, to testify over the objection and exception of the defendant concerning a conversation between one Mrs. Lightner and the witness, as follows:

"Q. Will you give us that conversation with Mrs. Lightner, please?

"Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I asked her if I might look at the sales tag that Mr. Gray gave her on Friday to find out how much she had paid him as he had not turned in the money to Swift and [45] Company."

XXXIII.

The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between one of the proprietors of Arjo's Market at Mayfield and the witness, as follows:

"Q. And give us the substance of that conversation with Arjo?

"Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent, and

immaterial and hearsay and not authorized by the defendant).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I asked Arjo if I might look at the sales tag Mr. Gray had given him on Friday and he said, 'Why, yes,' and he came back and wanted to know why I wanted to look at it, and he said there was some trouble between Mr. Gray and the full line salesman, that they were always fighting for the business, and he wanted to know if I wanted to compare the prices, and I said no. I said Gray was short in his accounts and had not turned the money in to Swift and Company and I wanted to find out the amount."

XXXIV.

The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between one of the proprietors of another market in Mayfield and the wit- [46] ness, as follows:

"Q. Give us the substance of the conversation that you had there in the market in Mayfield?

"Mr. Harrison: Same objection as heretofore interposed, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I told him that I wanted to see the sales tag [47] that Mr. Gray had given him on Friday, and he objected to that. So I told him that Mr. Gray was short in his accounts with the company and I wanted to find out how much he paid Mr. Gray as the money was not turned into the company."

XXXV.

The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between Mr. Charles Gould and the witness, as follows:

"Q. Did Mr. Gould say anything other than you have told us at that conversation to you?

"A. Well we talked——

"Mr. Harrison: Object to that on the ground that the conversation between Gould and the witness would not be binding on the defendant.

"The Court: Objection overruled.

"Mr. Harrison: Exception.

"(Witness) Mr. Gould told me that he was going to check the entire territory and route as there was some other shortage came up prior to that Friday; and we discussed just in a general way that there were certain tickets missing, and that he couldn't quite understand it, but that he was sent out to check the territory."

XXXVI.

The Court erred in permitting the plaintiff's witness Emmett Arjo to testify over the objection and exception of the defendant concerning a conversation between Eugene [48] Harbinson and the witness, as follows:

"Q. What was the conversation?

"Mr. Harrison: Object to that if the Court please on the ground that it is hearsay, incompetent, irrelevant, and immaterial.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) Mr. Harbinson asked to see my sales tag. I asked the reason for it and he said Mr. Gray had been accused of taking money from Swift and he was checking up to see how much I paid him. I replied, 'I'm sorry; I had no cash dealings with Mr. Gray,' that I had a weekly account."

XXXVII.

The Court erred in permitting the plaintiff's witness Fred Langbehn to testify over the objection and exception of the defendant concerning a conversation between Mr. Gould and the witness, as follows:

"(Witness) I had a conversation with Mr. Gould subsequent to the time Mr. Gray went on his vacation concerning Mr. Gray.

"Mr. Harrison: Just a moment. Are you asking for the conversation now, Mr. Welsh?

"Mr. Welsh: Yes.

"Mr. Harrison: We object to that, if the Court pleace, on the ground that it is irrelevant, incompetent and immaterial and hearsay.

"The Court: Overruled. Exception.

"Mr. Welsh: Q. Proceed, Mr. Langbehn.

"Mr. Harrison: No evidence of authority proved. [49] Exception.

"(Witness) Mr. Gould came in to check over bills of things we had bought from Swift and Company off their cold meat wagon. He asked if he could see the bills. I said he could but that we didn't have the bills in the store, that we had them at the house of Mr. Allen, my partner, a few blocks away. He said that he had a car and would take me out to Mr. Allen's house. I went up with him. On the way over there I had a conversation with him."

XXXVIII.

The Court erred in permitting the plaintiff's witness Fred Langbehn to testify, over the objection and exception of the defendant, concerning a conversation between Mr. Gould and the witness, as follows:

"Q. Just state what was said?

"Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent, immaterial, hearsay and no authority proved).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) He said the reason he would like to see the bills was it seemed Harry Gray had taken some of Swift's money just before he went on his vacation and they wanted to see just how much he had taken. Nothing more was said. When we arrived at the house, Mrs. Allen got out the bills, and Gould checked the bills we had there with the list he had in his little book. He checked the amounts and the bills with the totals in the books. [50]

XXXIX.

The Court erred in permitting the plaintiff's witness Fred Langbehn to testify over the objection and exception of the defendant concerning a conversation between Mr. Gould and the witness, as follows:

"Q. Did he make any other statements while he was going through the slips with reference to Mr. Gray?

"A. Yes, he said——

"Mr. Harrison: Same objection, (that it is irrelevant, incompetent, immaterial, hearsay and no authority proved).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"A. He said it sure looked kind of bad for Harry because it was here the day before he was supposed to go on his vacation and his cash was missing."

XL.

The Court erred in permitting the plaintiff's witness Polly Guptill to testify over the objection and exception of the defendant concerning a conversation between Mr. Gould and the witness, as follows:

"Q. Just go on from there. What did he say?

"Mr. Harrison: In order that the record may be clear, we object, if the Court please, on the ground that it is immaterial, irrelevant and incompetent, and no authority proved; hearsay.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) Mr. Gould asked to look over the receipts. I asked him why. He answered that the reason was that he was [51] sent out by Swift because Harry was short in his accounts, and he wanted to check up on his cash sales slips."

XLI.

The Court erred in permitting the plaintiff's witness Dorothy Hamilton Kipps to testify over the objection and exception of the defendant concerning a conversation between Mr. Gould and the witness, as follows:

"Q. Just state what was said.

"Mr. Harrison: Same objection as already stated in the case of the last witness, (that it

is immaterial, irrelevant and incompetent, and no authority proved; hearsay).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) Mr. Gould came in and asked to look over the accounts, saying that there was a shortage and he wanted to see what Mr. Gray's accounts were with Swift. He stated that it was Harry Gray's accounts that were short."

XLII.

The Court erred in permitting the plainitff's witness Arnold Montemagni to testify over the objection and exception of the defendant concerning a conversation between Mr. Harbinson and with witness, as follows:

"Q. Did you have any conversation with Mr. Harbinson in October of 1934 concerning Mr. Gray?

"Mr. Harrison: That is objected to on the ground that is already stated with respect to the last witness (that it is immaterial, irrelevant and incompetent, and no authority proved; hearsay). [52]

"The Court: Overruled. Exception noted.

"Mr. Harrison: Exception.

"(Witness) About the time Mr. Gray went on his vacation, Mr. Harbinson took the route and came along and asked me if I could produce some sales tags for the previous week. [53] He

told me Mr. Gray was short in his accounts, that is, in collections, and he would like to check on it."

XLIII.

The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant, as follows:

"Q. Did you have any conversations with those customers as to what had been said about you while you were gone?

"Mr. Harrison: Object to that, if the Court please, on the ground that it is purely hearsay, irrelevant, incompetent, and immaterial, not binding on this defendant. A statement to the witness cannot be a publication; all that this testimony would tend to prove would be a disclosure to this witness, except in so far as it would be purely hearsay.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I asked them to show me the tags again. They were reluctant to do so because they had shown them to Mr. Gould and Mr. Harrison and thought they had it all straightened out. They were rather cold and indifferent and failed to give me any cooperation as far as finding out what I wanted to know. Some refused to show me the tags and some finally did. They wanted to know what

Swift & Company had charged me with and how much money I had gone south with, what I had done with the new car I bought with the money, and remarks of that type." [54]

XLIV.

The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant, as follows:

"Q. Give us the conversation with Mr. Hartl?

"A. I asked——

"Mr. Harrison: That is objected to on the ground that a statement to the witness can't be slander, if the Court please.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I asked if I could check through the tickets again, and he refused me, saying that the case was closed; that they wanted that check that I had given them once, and he says, 'As soon as you give us the check we will close this and forget all about it.' So I went to Mr. Kelly and asked if he wouldn't do something about it to help me, because no one was giving me any cooperation getting to the bottom of it. So he finally talked to Mr. Hartl, and Mr. Hartl consented that I could look through the tags again."

XLV.

The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant, as follows:

"Q. Mr. Gray, did you take any of this money that you collected on that Friday morning and keep it?

"Mr. Harrison: That is objected to on this ground: There is no claim in this case that this witness embezzled or [55] took the money; there is no attempt to defend on that ground. The claim is simply that the statement that he was short in his accounts was true. And we submit that it is wholly immaterial, whether or not he took the money.

"The Court: Overruled.

"Mr. Harrison: Exception.

"(Witness) No, sir, I never collected any money for Swift & Company and failed to turn it in."

XLVI.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

"Q. Who was the first meat company you applied to for employment?

"Mr. Harrison: That is objected to, if the Court please, on the ground that it is irrelevant, incompetent and immaterial and has no

connection with the slander charged. Now, there is no showing here and no showing has been attempted to be made that any disparaging remarks of any kind or character were made to any other employers. Counsel now is going into the question of what other employers may have done, and that will obviously open a very wide scope of inquiry.

"The Court: Overruled.

"Mr. Harrison: Exception.

"(Witness) I first applied for employment at the Virden Packing Company at its offices in South San Francisco, and I talked with the Sales Manager, whose name I don't recall."

[56]

XLVII.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

"Q. What was the conversation you had with the sales manager of the Virden Packing Company?

"Mr. Harrison: That is objected to as hearsay, incompetent, irrelevant and immaterial.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) He told me to drop back in a day or two and he then told me that he had nothing for me."

XLVIII.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

"Q. Give us the conversation you had with that man at Cudahy's?

"Mr. Harrison: Same objection, if the Court please, irrelevant, incompetent, immaterial and hearsay.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"A. I told him the experience that I had; that I wanted to stay in the meat business; that I was willing and had an education and quite a foundation in the meat business; that I thought I could do them some good. He was very much [57] interested in it. I dropped back in several days and spoke to him again, and he said that he didn't have anything for me."

XLIX.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

"Q. Give the conversation you had with the sales manager of Hormel Packing Company?

"Mr. Harrison: We object upon the same ground.

"The Court: Yes, overruled. Exception.

"Mr. Harrison: Exception.

"A. I told him about the same as I had told the other concerns, and he asked me to take this application and fill it out and he would talk to me, or I could just talk to the general manager when I came back. I filled out the application and came back and talked to either the sales manager or the general manager, either one of the two. On the first occasion, I don't remember whether it was the sales manager; it was one or the other; I talked to both men. I asked the second man if I should leave my application blank that I had filled out, and he said, 'No, I'm afraid we haven't any place for you.' "

L.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

"Q. What happened there? Give the conversation you [58] had with those people at Hickman Products Company.

"Mr. Harrison: My objection goes to this conversation, too, if the Court please.

"The Court: Yes, overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I told him my experience down the Peninsula, that I had been running a truck

similar to the one that they had down there. I came back later and he said that they had nothing for me."

LI.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

"Q. Give the conversation at Zee and Zoe.

"Mr. Harrison: We object to the conversation on the grounds already stated.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) He told me he was considering three men, of whom I was one. He also asked me to come back the following day, and he would give me his answer. I came back the following day, but he said, 'I am sorry, Mr. Gray; we have given the job to someone else'."

LII.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning the plaintiff's endeavors to obtain employment, as fol- [59] lows:

"Q. Did you get employment at either Cudahy Packing Company or Houser Packing Company in Los Angeles?

"Mr. Harrison: Object to that on the ground that it is immaterial, remote and having no connection with the slander complained of.

"The Court: Overruled.

"Mr. Harrison: Exception.

"A. No, sir. I did not get employment after I left San Francisco until June, 1935."

LIII.

The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant, as follows:

"Q. What was your conversation with Mr. Hartl about the matter?

"Mr. Harrison: Object to that on the ground that it is irrelevant and immaterial.

"The Court: Overruled.

"Mr. Harrison: Exception.

"(Witness) I told Mr. Hartl that I had just come from interviewing Jack Hamilton down at his home near Santa Clara. And he asked me what Mr. Hamilton had said. I told him that I had accused Jack Hamilton point blank of being the man that framed me all along; that I wanted him to admit his guilt against me and straighten me out after he had caused all the trouble for me. Mr. Hartl said, 'Gray, what did he say?' I said, 'He just wouldn't admit it. He said he was on leave of absence and there was no trouble with Swift & Company.' [60] So Mr. Hartl said that he never believed that Hamilton was guilty of all that they had charged him with, because he was

one of his very best friends. I asked him to reimburse me with this money I so willingly paid when all this trouble arose. He said, 'Until Hamilton admits he stole it from you, we can't do a thing about it.' "

LIV.

The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant, as follows:

"Q. Give the conversation with Mr. Hartl?

"Mr. Harrison: My objection goes to this as irrelevant, incompetent and immaterial.

"The Court: Overuled. Exception.

"Mr. Harrison: Exception.

"(Witness) I asked him again if he would reimburse me and he said, 'Gray, it is entirely out of my hands. I would advise you to go to see Mr. Smart, our attorney.' "

LV.

The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant, as follows:

"Q. Did you go to see Mr. Smart?

"A. I went to Mr. Smart, Swift & Company's attorney, and told him, explained the case to him.

"Mr. Harrison: This is objected to, if the Court please, as immaterial.

"The Court: Overruled. [61]

"Mr. Harrison: Exception.

"(Witness) And Mr. Smart said that there was nothing that he could do but advised me to go and see Jack Hamilton's attorney, which I did."

LVI.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of the defendant, as follows:

"(Witness) I went to Jack Hamilton's attorney and demanded that he——

"Mr. Harrison: I object to this as dealing with a matter that obviously has no bearing on the controversy between this plaintiff and the defendant, if the Court please.

"The Court: Overruled.

"Mr. Harrison: Exception.

"Mr. Van Dyke: Go ahead.

"(Witness) I demanded of Jack Hamilton's attorney that he make up the money he had stolen from me, which he said he didn't know anything about. I in turn went to Redwood City where Hamilton was in jail."

Wherefore, the defendant Swift and Company prays that the judgment heretofore entered in favor of plaintiff Harry J. Gray and against the defend-

ant be corrected and reversed, and for such other and further relief as to the Court may seem just and proper.

Dated: April 1, 1938.

MAURICE E. HARRISON
T. L. SMART
MOSES LASKY
BROBECK, PHLEGER & HARRISON
Attorneys for Defendant

[Endorsed]: Filed Apr. 1, 1938. [62]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING ASSIGNMENT OF ERRORS

State of California,
City and County of San Francisco—ss.

George Helmer, being first duly sworn, deposes and says:

That he is a citizen of the United States and a resident of the City and County of San Francisco, State of California; that he is over the age of 18 years and not a party to the above entitled cause;

That Messrs. Brobeck, Phleger & Harrison and T. L. Smart, Esq., the attorneys for the defendant, have their offices in the City and County of San Francisco, State of California; that John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, the attorneys for the plaintiff, have their offices in the

County of Sacramento, State of California, in the capital National Bank Building in the City of Sacramento;

That on the first day of April, 1938, in the City and County of San Francisco, affiant deposited in the United States Mail a sealed envelope, with postage thereon fully prepaid, addressed to John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, Capital National Bank Building, Sacramento, California; that said envelope contained a copy of the attached Assignment of Errors; that there is a daily service by United States mail at [63] the place so addressed and that there is a regular communication by mail between said place of mailing and the place so addressed.

GEORGE HELMER

Subscribed and sworn to before me this first day of April, 1938.

[Seal] EUGENE P. JONES

Notary Public in and for the City and County of San Francisco, State of California. [64]

[Title of District Court and Cause.]

COST AND SUPERSEDEAS BOND ON APPEAL

Know All Men by These Presents:

That we, Swift and Company, a corporation, as Principal, and Maryland Casualty Company, a corportion, duly incorporated under the laws of the

State of Maryland and having the power to execute bonds and undertakings in judicial proceedings and duly authorized to transact a general surety business within the Northern District of California, as Surety, are held and firmly bound unto Harry J. Gray in the full and just sum of Twenty-five Hundred ($2500.00) Dollars, to be paid to the said Harry J. Gray, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of April, 1938.

Whereas, lately at a District Court of the United States for the Northern District of California in a suit pending in said Court, between Harry J. Gray, plaintiff, and Swift and Company, a corporation, defendant, a judgment was rendered against the said Swift and Company for the sum of $1750.00, plus costs, and the said Swift and Company having filed its petition for an appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and said appeal having been allowed by order of the above-entitled Court, to [65] reverse the judgment in the aforesaid suit, and a citation having been directed to the said Harry J. Gray citing and admonishing him to be and appear in a United States Circuit Court of Appeals for the Ninth Circuit to be held at San Francisco, in the State of California; and

Whereas, Swift and Company desires, during the progress of such appeal, to stay the execution of the judgment of the District Court;

Now, the condition of the above obligation is such, that if the said Swift and Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

The undersigned and each of them do jointly and severally agree that in case of a breach of any condition of the above obligation the above-entitled Court may in the above-entitled matter upon notice to said Maryland Casualty Company, the Surety named herein, of not less than ten (10) days, proceed summarily in the above-entitled action to ascertain the amount which said Surety is bound to pay on account of said breach and render judgment therefor against it and award execution therefor.

SWIFT AND COMPANY
By T. L. SMART
Its Attorney in Fact
as Principal

[Seal] MARYLAND CASUALTY COMPANY
By W. G. KELSO
Its Attorney in Fact
as Surety [66]

The form and amount of the bond and sufficiency of the surety approved this 4th day of April, 1938.

A. F. ST. SURE
United States District Judge [67]

State of California,
City and County of San Francisco—ss.

On the 2nd day of April in the year One Thousand Nine Hundred and thirty eight, before me, Kathryn E. Stone, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared T. L. Smart known to me to be the person whose name is subscribed to the within and annexed instrument, as the Attorney in fact of Swift and Company and acknowledged to me that he subscribed the name of Swift and Company thereto as principal and his own name as Attorney in fact.

In Witness Whereof, I have hereunto set my hand, and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year last above written.

[Seal] KATHRYN E. STONE
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires March 1, 1941. [68]

State of California,
City and County of San Francisco—ss.

On this 2nd day of April in the year one thousand nine hundred and thirty-eight before me, Antonio M. Cogliandro, a Notary Public in and for the City and County of San Francisco, personally appeared W. G. Kelso, known to me to be the Attorney-in-Fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

[Seal] ANTONIO M. COGLIANDRO
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires Dec. 31, 1938. [69]

AFFIDAVIT OF MAILING COST AND SUPERSEDEAS BOND

State of California,
City and County of San Francisco—ss.

George Helmer, being first duly sworn, deposes and says:

That he is a citizen of the United States and a resident of the City and County of San Francisco,

State of California; that he is over the age of 18 years and not a party to the above-entitled cause;

That Messrs. Brobeck, Phleger & Harrison and T. L. Smart, Esq., the attorneys for the defendant, have their offices in the City and County of San Francisco, State of California; that John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, the attorneys for the plaintiff, have their offices in the County of Sacramento, State of California, in the Capital National Bank Building in the City of Sacramento;

That on the 2 day of April, 1938, in the City and County of San Francisco, affiant deposited in the United States mail a sealed envelope, with postage thereon fully prepaid, addressed to John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, Capital National Bank Building, Sacramento, California; that said envelope contained a copy of the attached Cost and Supersedeas Bond; that there is a daily service by United States mail at the place so addressed and that there is a regular communication by mail between said place of mailing and the place so addressed.

GEORGE HELMER

Subscribed and sworn to before me this 2nd day of April, 1938.

[Seal] EUGENE P. JONES

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 4, 1938. [70]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered that on March 1, 1938, at a term of the United States District Court for the Northern District of California, Southern Division, the above-entitled cause came on for trial before the Honorable A. F. St. Sure and a jury; and the following proceedings took place. Thereupon [71] a jury was impaneled and sworn, and the trial commenced on said first day of March 1938, and continued on the second, third, and fourth days of March, 1938.

Messrs. Butler, Van Dyke & Harris, by Benjamin F. Van Dyke, Esq., and John M. Welsh, Esq. appeared for the plaintiff; and Messrs. Brobeck, Phleger & Harrison, by Maurice E. Harrison, Esq., and Moses Lasky, Esq., and T. L. Smart, Esq. appeared for the defendant.

Thereupon the plaintiff called

HARRY J. GRAY,

the plaintiff, as a witness on his own behalf, and he testified as follows:

Direct Examination

I am 28 years old. I first went to work for Swift and Company in 1933. I had finished 3 years of education at the University of Arizona. Until October of 1933 I worked in various departments in the plant at various manual labor jobs. In October, 1933, I became a sausage truck route driver, on the

(Testimony of Harry J. Gray.)

South San Francisco to Palo Alto route, and stayed on that route for the rest of my employment with Swift and Company.

My job was to call on the different markets in the different towns with a stock of bacon, sausages, etc. on the truck, and sell the material right from the truck.

I would order my material each day from the order clerk for the next day. The plant would make up the order and place that material on my truck. I would check it in the morning to see if everything was there. Then I would start on the route. I had a sales book in which I marked each [72] customer's name, address, the different materials sold, and the amount of the purchase. If it was a cash paid account, I marked paid on the slip. These entries were made in triplicate. One copy was left with the customer. With respect to what I turned into the company, I would tear out the charge tags and leave them with the department that checked up on all charge accounts. As for the cash sales, I would make a tabulation in a cash collection book, by towns, showing customers, dates, articles bought, and amounts collected, each town on a separate sheet. Then I would turn in the cash tags from the sales book together with the cash collection book and my money. The cashier, Mr. Hamilton, would receive the money the following day and stamp the amount paid on the cash collection book and return the book to me as my voucher that I had turned in the

(Testimony of Harry J. Gray.)

money. Hamilton was cashier all the time I was there.

With respect to the time when I turned in the cash I had collected, I came back each day and got to the plant at 7:30 p. m. or 7:45 p. m. and there was no one in the office except an order clerk. I would give him my order for the next day to replenish my stock. As there was no one there who would give me a receipt, I took the money home, would make up my reports, and the following morning I would come back to the office and throw that money inside the cashier's cage. The only one there at night was an order clerk and he would not give me a receipt. The cashier would not be there in the morning when I arrived. He did not arrive until 8 a. m., and as I had to be out by 7:30 or 7:45 a. m., I could not wait for him to get my receipt, and that was the reason I had been leaving it in the cage and getting the receipt the following day. I followed this practice some six or seven months. [73]

The question of shortage arose first on the Saturday afternoon as I was getting ready to leave on my vacation, with respect to my Friday receipts which I had collected the day before and turned in Saturday morning. I came into the office Saturday morning about 7:15 or 7:20 and left the money as I had been doing for the past 6 or 7 months, back in the corner of the cashier's cage. I always came in and stuck my arm back of the cubby hole and

(Testimony of Harry J. Gray.)

threw it away back in the corner where it was not possible for anyone to reach it and drag it out.

The cashier's cage was built up about waist high with boards and inside was a shelf that they worked off of and on top of the shelf began the cage which was a big wire screen completely around it with the door always locked. The screen ran some four or five feet above the counter itself. On two sides there were cubby holes where the cashier does his transactions with people that come up to the cage. The screen ran to maybe three or four feet from the ceiling and the cage was completely enclosed on all four sides. It was about 15x12 feet.

The bundle which I tossed into the cage on Saturday morning contained my cash collections for Friday to the extent of about $60. There was one check and the rest was in paper or silver. There were also the tags and a number of tickets.

After throwing the bundle in on Saturday morning, I went out on my truck and picked up Mr. Harbinson, and we went down the Peninsula selling our customers. Mr. Harbinson had been with me for two days previous. I was taking him around introducing him to the customers, because I was leav- [74] ing on a vacation for two weeks, and he was taking my place. I had made my arrangements with the company for my vacation.

We came in from the route on Saturday about 12:30, checked our merchandise in the plant and went back across the street and made up our re-

(Testimony of Harry J. Gray.)

ports and returned to the plant about 1:30 that Saturday afternoon. I came in, left my receipts and cash from the day before and a couple of reports that my sales manager had asked me to leave before I left. I was heading out the door on my vacation when Jack Hamilton, the cashier, stopped me and said, "Gray, where is your cash collection book for Friday? I did not get it this morning." I said, "Jack, you must have got it. Don't tell me that. I am going on a vacation, don't wreck my vacation by telling me something like that." He said, "No, I did not get it." I said, "It must be there, I left it there this morning."

We went up and ransacked the cage and looked in the wastepaper basket. Harbinson and I went up on the counter and looked up on top of the cage to see if the dirt or dust had been disturbed or any fingerprints, but it was all heavily coated with dirt and dust. While this was going on there were present Mr. Jack Hamilton, the cashier, Mr. Irving Everett, the assistant sales manager, Mr. Gene Harbinson, and myself. Mr. Irving Everett was assistant sales manager, but Mr. Frank Kelly was the regular sales manager. Mr. Kelly was in Chicago and in his absence Mr. Everett was in charge of the sales department,—in other words, my boss.

Mr. White was the general manager of Swift and Company on the Pacific Coast and in charge of our plant in South San Francisco. Mr. Hartl is in charge of the office employment there of the South San Francisco plant. [75]

(Testimony of Harry J. Gray.)

That Saturday afternoon after we had looked up on the cage, we continued to look around the office to see if we could not possibly find some remnants of tickets or cash collection book that I had turned in. Mr. Hamilton said that he had not found my cash collection book in the cage that morning. Then he said that the cashier's cage had been locked and he could not understand how anybody could have gotten money out of there. So I told Mr. Everett that I knew the approximate amount of the money that had been collected and that I would make out a list of this amount and leave it with him. I told him that I had a week's wages coming and a check of a week that they were giving me for a vacation, and that would more than cover the amount that had been stolen out of the cashier's cage that morning. I told him that I had planned on my vacation for some months and that I wanted to go, but I did not think there was anything else that I could do, and he said it was perfectly all right, to go ahead, that he felt they would find the money, that things would straighten out, and it would cheer me up on my vacation. I told Mr. Everett that I had taken the money in that morning before I left, as I had been doing for the past six or seven months and I could not understand why Mr. Hamilton had not received it that morning. The possibility of someone taking it out of the cage was rather remote, but I knew that I had left it there and that it should be there.

(Testimony of Harry J. Gray.)

I made out a complete list of all the people I had collected from and the approximate amount I had collected. I told Mr. Everett that it was within a few dollars of the exact amount I had collected the day before. The total I showed was approximately $60. This list I made out showed the [76] name of the customer, the town the customer had an establishment in, and the amount of merchandise that he had purchased from me.

No further conversation then took place; I then left the plant for my vacation.

I returned Sunday two weeks later. I expected to go back on my job Monday morning, but was informed by Mr. Harbinson, who had taken my place, that I was to report to the office Monday morning. I did that and was received by Mr. White, the general manager, Mr. Frank Kelly, who had returned from Chicago, Mr. Irving Everett, the assistant sales manager, and Mr. Jack Hamilton, the cashier. Outside of myself, that was all who were there.

"Q. Now, give us the conversation as near as you can that occurred when you went there and met those gentlemen?

"Mr. Harrison: We object to the conversation on the ground, if the Court please, that any discussion between the corporate officers and the plaintiff was not a publication and cannot be relied upon as a slander.

"The Court: Overruled.

"Mr. Harrison: Exception."

(Testimony of Harry J. Gray.)

(Witness resuming) I asked what this was all about, why they had me in there, and why I did not go back on my job. Mr. Hartl said, "Gray, besides that money that was missing the day you left and knew about, we have some twenty or twenty-one other tickets that date as far back as three weeks before you left that have never been turned in. We have it in black and white against you." Mr. White asked me what I had to say about it, and I said, "Well, gentlemen, there isn't anything I can say. I assure you that I have been honest and above board about [77] everything and I know nothing about what has taken place, except that I know the money was stolen the Saturday I left on my vacation."

Then Mr. Kelly, the sales manager, showed me five sales tickets that had the numbers torn off of the corners. He said, "Gray, this looks like a buildup for something bigger, something that has happened right now. How can you explain this?" I said, "You must be crazy, that is just a case of the number not being torn off where the paper was perforated."

They asked me what I intended to do about it all. They said that they had wired Chicago and that I was suspended from the company; that either I make up the deficit against me or I would be turned in to the bonding company. I said, "Well, gentlemen, you cannot stick this on me until you have given me an opportunity to prove my innocence.

(Testimony of Harry J. Gray.)

You haven't got anything on me." Then Mr. Hartl said, "Gray, we have it in black and white. We have tickets that are missing right out of the middle of your sales book; for example, 7 and 9 and the ticket number 8 is missing; we have it in black and white. We have it cold." I said, "Mr. Hartl, if you can prove that to me, I will admit that I am guilty, but if you cannot prove that statement and if you let me look in the files, I can show you that you are wrong."

They claimed that they had looked through the files and found every bit of evidence that they wanted; that I could not find anything, and that it would do me no good, and that I did not know anything about their books. I said, "I know that, but give me an opportunity to prove myself. I have to do something."

So they took me into the room where they kept their [78] receipts and let me look through the tags of collected money that had been stored. I said, "I have a lead and I am going to try and work on it and try to find something in black and white and prove my innocence." Mr. Hartl asked me who I thought it was and I said "I will prove that to you later." I took the numbers of all these missing tickets, and proceeded to go down the Peninsula to see if I could find some information that would help me clear myself. I talked to the customers and after investigating I came back to the plant. Mr. Hartl said, "Gray when are you going to make out that

(Testimony of Harry J. Gray.)

check for the shortage. We want to close this case and get it off our hands and forget all about it."

I told him I thought that was admitting guilt, if I wrote out a check and that I did not want to do it. He said that if I did not write out the check I would be blacklisted with the bonds company and could not get a job anywhere. I made out the check to Swift and Company and left it with Mr. Hartl. Later I came back to the plant and told Mr. Hartl that I had stopped payment on the check, that I thought I was wrong when I gave it to him, and that I wanted to let him know about it because I did not want him to feel that I had done something wrong without him knowing about it.

After investigating down the Peninsula for a few days, I came back in and wrote another check. I gave it to Mr. Hartl and Mr. White. Then I asked if I got my job back, that after all what they wanted me to do was to clear up this deficit; that if I straightened that up I naturally expected to go back on the job. Mr. White said, "I will speak to Kelly and your manager about it, the sales manager."

They came back and Mr. White told me that they did not have anything for me; that I could not go back on the job. [79] I told him that I was positive I knew who had taken this money; that if he would let me explain it to him, I could convince him that there was a guilty man in their midst somewhere. He said, "Gray who is it?" I replied, "It is Jack

(Testimony of Harry J. Gray.)

Hamilton, the cashier." Mr. White said, "Gray, I would not even listen to your story. Mr. Hamilton has been with Swift and Company for eighteen years, a trusted employee, I won't hear a thing about it." I asked Mr. White if there was another sales job I could go back on and he said, "No." I asked if there was any other job I could have, and they said, "No," they had nothing for me.

"Mr. Van Dyke: Q. Now, Mr. Gray, after you left Swift and Company's place of business, after this last conversation, what did you do with regard to seeking employment?

"Mr. Harrison: Now, this, I presume is offered for the purpose of showing a transaction between this witness and other persons with whom he sought employment. We object to that testimony on the ground that it is wholly incompetent, irrelevant and immaterial; it is not shown to have any connection with the alleged slanderous statements until proof is offered by these other persons the statement was made. It is hearsay testimony, and has no connection with the slander charged in the complaint.

"The Court: Overruled.

"Mr. Harrison: Exception.

"A. I went to Virden Packing Company and asked for employment. That is the first place I went to."

Thereupon a discussion occurred and the plaintiff was withdrawn from the witness stand, temporarily. [80]

Thereupon

J. E. HARBINSON

was called as a witness on behalf of the plaintiff and testified as follows:

Direct Examination

I live in Sacramento; my occupation is sheep and cattle raising. From June, 1934 to February, 1936 I worked for Swift and Company in South San Francisco. I know the plaintiff Harry Gray. I have known him since about two weeks after I started working for Swift. On Monday, October 15, 1934, I took over the route wagon that he had been driving. I went out three days prior to that time on the wagon with Mr. Gray. The route was from South San Francisco to Mayfield. We called on approximately eight towns. I had received my instructions to go upon the wagon with Mr. Gray from Mr. Kelly, the sales manager. Those instructions were to learn the route with Gray and to take over the truck on Monday. I went on the truck with Gray and met the customers on the route, being introduced to them by Mr. Gray. Mr. Kelly stated that the reason I was to take over the truck was that Gray was going on his vacation. He told me I was to take it over while Gray was gone.

On the Saturday preceding the Monday on which I took over the truck, I was present at a conversation at the office of Swift and Company concerning some cash receipts that Gray was supposed to have collected. Hamilton, the cashier, Mr. Everett, the

(Testimony of J. E. Harbinson.)

assistant sales manager, Harry Gray and I were those present. It came about in the following way: On coming back to the plant on Saturday afternoon around one or one-thirty, we went to the office to turn in our tags and pick up the mail. On the way up, Mr. Hamilton asked Mr. Gray [81] where his collections were for Friday. That started the conversation. Gray stated he was positive that he placed the envelope which contained the sales tags and money in the cashier's cage. Hamilton said nothing about it except that he had not received it.

We looked all through the cashier's cage and could not find it any place whatsoever. We looked all over the office, went through all the wastepaper baskets and looked up on the cashier's cage and could find no trace of anyone going over it, and then Gray and I went back to the hotel in which we lived. And we met Mr. Gould, an employee of Swift. He was at that time what they would call a relief salesman. We looked all through the room in which Gray lived for this envelope. I was with Gray the night before when he made up all his cash receipts. I had last seen the envelope when Mr. Gray left for the office Saturday morning, but I did not go with him to the office. I had seen him make it up, and I saw him leave with the envelope.

After we had looked through the room, Mr. Gould, Mr. Gray, and I went back over to the office and there talked with Mr. Everett and Mr. Hamilton. The substance of the conversation concerned the

(Testimony of J. E. Harbinson.)

loss of the money, that it was not turned in. Mr. Gray was leaving on a vacation, and he asked Mr. Everett if it was all right for him to go, that he had sufficient amount of money coming and that he would make up the shortage if it could not be found.

Mr. Gray made up a list with names of the customers whom he had called on on Friday and the approximate amount that he could recall, and he gave this list to Mr. Everett. Mr. Everett said it was all right for him to go on his vacation. [82] That was all that occurred that I can recall, except just a general conversation about the money.

I next contacted the matter on Monday morning. I talked with Mr. Everett then. I went to him because on Saturday before I left there, he told me to report to him Monday morning. At the conversation on Monday morning with Mr. Everett, he gave me the list which Gray had prepared and said, "I want you to go out and check on this shortage."

I went out on my route that morning with the list, and I talked with the customers whose names were on the list.

I do not recall the name of the first person I called upon on that list. It was the Los Angeles Fruit Market on Broadway in Burlingame. I talked with the lady who owns the market.

"Q. Will you just give us the conversation you had with the lady who owned the market?

"Mr. Harrison: That is objected to on the ground that it is hearsay, not binding upon this defendant.

(Testimony of J. E. Harbinson.)

"The Court: What is the purpose, Mr. Van Dyke?

"Mr. Van Dyke: To prove the slander.

"Mr. Harrison: We submit it does not show any authority in this witness, so the words spoken by him would not be within the scope of his authority to bind the company.

"The Court: Objection overruled.

"Mr. Harrison: Exception.

"The Court: Yes, exception noted."

(Witness resuming) I went in and asked this woman if I could see the sales tags which Gray had given her on Friday. After some discussion as to why she wouldn't let me see it, I told her that Mr. Gray was short in his accounts with the [83] company; that I wanted to find out how much she had paid Mr. Gray on Friday. There was no further conversation with her other than arguing with her over the fact that she thought I was trying to compare prices. There was no further conversation with respect to what I told her I was there for. She gave me the tag.

I next went to see a meat market in San Mateo called "Al Monte's Meat Market." I there talked with one of the owners whom I just knew as "Al."

"Q. All right. Now, will you please give the conversation you had with the man at Monte's Market that you called Al?

"Mr. Harrison: Object to that, if the Court please, on the ground that it is irrelevant, incompe-

(Testimony of J. E. Harbinson.)

tent, and immaterial and hearsay and not authorized by the defendant.

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) I went in and asked him if I could see the sales tag that Mr. Gray had given him on Friday. He said that he did not have it with him, and he wanted to know why, and I said I was out checking Mr. Gray's route, that he had been short in his accounts with the company and that I wanted to find out the amount he had paid. So he went home and got his receipt. I waited in the market till he came back, and he gave me the receipt, and he said that he had paid by check and that he would notify the bank to stop payment on the check.

I have given all the conversation that I can remember that I had with this gentleman called Al.

I next went to a small grocery store just outside of San Mateo and talked with the owner who was a young fellow whose [84] name was Larry. I don't know whether that was his first name or his last name. I do not know the name of the store, but it was just about a mile out of San Mateo.

"Q. Now, give us the conversation with Larry?

"Mr. Harrison: Same objection already stated, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant).

"The Court: Yes, overruled. Exception.

"Mr. Harrison: Exception."

(Testimony of J. E. Harbinson.)

(Witness resuming) I said that I wanted to see the sales tag Mr. Gray had given him on Friday. There was some discussion as to why I wanted to see it, and I told him that Mr. Gray was short in his accounts and I wanted to find out how much Larry, the owner of the store, had paid Mr. Gray, as he did not turn in his money.

I next went into the Economy Market in Menlo Park and talked to the owner of the store whom I only knew as Carl. It may have been a Carl Feltman or Fieldman.

"Q. Now, when you went there, what occurred there, what conversation took place with Carl?

"Mr. Harrison: The same objection, if the Court please,—irrelevant, incompetent, and immaterial, and hearsay.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception."

(Witness resuming) I wanted to see his sales tag that Mr. Gray had given him on Friday, and we had some discussion as to why I wanted to see it, and he said I merely wanted to compare prices that Mr. Gray had quoted him on Friday. I said, "No," that I was checking Mr. Gray's route, that he was short in his accounts and he had not turned any money in. [85]

I then called on another market in Palo Alto and three more in Mayfield. There was a small delicatessen where there was a young boy named Joe who was running the business for his mother at Palo

(Testimony of J. E. Harbinson.)

Alto. I do not know his last name. I talked to Joe.

"Q. What conversation took place between yourself and Joe?

"Mr. Harrison: My objection may be deemed interposed to that conversation, may it, your Honor, (that it is irrelevant, incompetent and immaterial and not authorized by the defendant)?

"The Court: Yes, overruled.

"Mr. Harrison: Exception."

(Witness resuming) I asked him if I could see the sales tag for Friday that Mr. Gray had given him and that Mr. Gray was short in his accounts with the company. I wanted to find out how much money he had paid Mr. Gray.

Then at Mayfield I went to Mrs. Lightner's Corner Delicatessen and talked to Mrs. Lightner herself.

"Q. Will you give us that conversation with Mrs. Lightner, please?

"Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent and immaterial and hearsay and not authorized by the defendant).

"The Court: Overruled, Exception.

"Mr. Harrison: Exception."

(Witness resuming) I asked her if I might look at the sales tag that Mr. Gray gave her on Friday to find out how much she had paid him as he had not turned in the money to Swift and Company.

The parties to these conversations I had were all on my regular route that I called on Friday and

(Testimony of J. E. Harbinson.)

the previous day or [86] two with Mr. Gray. I was driving the wagon on that route on Monday. These conversations which took place were with people that I was calling on and getting their orders and selling them at the same time out of the wagon.

I went to Arjo's Market at Mayfield and talked with one of the Arjo boys.

"Q. And give us the substance of that conversation with Arjo?

"Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent and immaterial and hearsay and not authorized by the defendant).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception."

(Witness resuming) I asked Arjo if I might look at the sales tag Mr. Gray had given him on Friday and he said, "Why, yes," and he came back and wanted to know why I wanted to look at it, and he said there was some trouble between Mr. Gray and the full line salesman, that they were always fighting for the business, and he wanted to know if I wanted to compare prices, and I said, "No." I said Gray was short in his accounts and had not turned the money into Swift and Company and I wanted to find out the amount.

I went to another market in Mayfield but do not know the market or the name of the person to whom I talked. He was part owner and was someone we had dealt with on Friday.

(Testimony of J. E. Harbinson.)

"Q. Give us the substance of the conversation that you had there in the market in Mayfield?

"Mr. Harrison: Same objection as heretofore interposed, (that it is irrelevant, incompetent, and immaterial and hearsay, and not authorized by the defendant). [87]

"The Court: Overruled, exception.

"Mr. Harrison: Exception."

(Witness resuming) I told him I wanted to see the sales tag Mr. Gray had given him on Friday, and he objected to that. So I told him that Mr. Gray was short in his accounts with the company and I wanted to find out how much he paid Mr. Gray as the money was not turned into the company.

I called on all these people on Monday. They are all that I can recall that I did call on that day. I returned from my route that day, but I had no conversation with Mr. Everett concerning the results of that day's work. I went out again on Tuesday. I had not on Monday seen all of those who were on the list.

Most of the parties I called on Tuesday were charge accounts where no money had been paid, the sales being on credit. I continued on this route inquiring about the Friday sales until about Tuesday noon when I met Mr. Gould, who was at that time a relief salesman. I believe I met him in San Mateo while I was out on the route. This was before I had finished checking the sales tags. Mr. Gould said he was sent out by Mr. Hartl to check the entire terri-

(Testimony of J. E. Harbinson.)

tory. I then ceased my investigation. The list that I had I put on Mr. Everett's desk Tuesday night.

"Q. Did Mr. Gould say anything other than you have told us at that conversation to you?

"A. Well, we talked——

"Mr. Harrison: Object to that on the ground that the conversation between Gould and the witness would not be binding on the defendant.

"The Court: Objection overruled. [88]

"Mr. Harrison: Exception."

(Witness resuming) Mr. Gould told me that he was going to check the entire territory and route as there was some other shortage came up prior to that Friday; and we discussed just in a general way that there were certain tickets missing, and that he couldn't quite understand it, but that he was sent out to check the territory.

Cross Examination

I went to work for Swift and Company in June, 1934.

Between June, 1934 and October, 1934 I was working in the plant. I was living at the Stockyards Hotel which is across the road from the office of Swift and Company in South San Francisco. Some of Swift and Company's employees stayed there. From June to October, 1934, I was rooming with Harry Gray as his roommate, and I got to know him quite well.

(Testimony of J. E. Harbinson.)

I was on friendly terms with him and went out with him socially. I had a friendly feeling toward him.

I had been out on the route with Mr. Gray on Thursday, Friday and Saturday, October 13. We arrived at the office on Saturday around one-thirty and then occurred the discussion to which I have already testified. At that discussion Mr. Gray asked Mr. Everett if he could go on his vacation, saying there was enough money coming to him to take care of the shortage and that he would make up the shortage. That was Mr. Gray's expression at the time. At that meeting in the office there, Mr. Gray wrote out that list in his own handwriting. He told Mr. Everett that he could take this list he had prepared in order to check with the amount that was short. In other words, he told Mr. Everett that he was willing to make [89] up the shortage and that he had prepared this list of customers he had called on so that a check could be made on the amount of the shortage. That was the substance of it. At that time, on Saturday, October 13, I was very much interested in helping Gray out; I was friendly with him and I believed in him. At that time I believed that Gray was honest. At one time there was a doubt in my mind when Mr. Gould told me of this other case, but at least up to Tuesday noon, October 16, 1934, I believed him absolutely honest.

I never told anybody he was dishonest.

(Testimony of J. E. Harbinson.)

I never said to anybody anything in substance or effect that he was dishonest or crooked at any time prior to October 16, 1934 or at any other time.

In other words, I never said to anyone in substance that Harry Gray had embezzled money.

I cannot recall the names of anyone to whom I spoke on Tuesday. On Monday I had this list that Gray had prepared for the purpose of being check, and when I came to one of those people I would ask him for his Friday sales tag.

I never volunteered anything about the reason why I was there asking unless they objected or asked why I was requiring the sales tag. It was only in response to their questions as to why I wanted the sales tag that I referred to the shortage. I don't believe anyone on whom I called gave me sales tags without raising any objection about why I wanted it.

I have mentioned all the people to whom I spoke on Monday as far as I can remember. When they asked me why I wanted the sales tag, I told them that Mr. Gray had this shortage in the accounts.

I cannot remember any other statements which I made [90] to them on that subject other than the mere statement that this shortage existed.

And that is also true clear down to Tuesday noon of October 16, 1934, when I abandoned this checking entirely when I found that Mr. Gould was doing the work.

(Testimony of J. E. Harbinson.)

It is true that on Saturday afternoon Mr. Gray knew I was going to take his place on the route during his vacation. He knew that when he wrote out this list.

I had an interview with Charles P. Gould and M. P. Hogan at Sacramento on December 3, 1936. Mr. Hogan told me that he was investigating this case for Swift and Company and the three of us had a conversation in a place in Sacramento where food and drinks were served. Mr. Hogan asked me to sign a statement, and I said I would prefer not to sign a statement. Mr. Hogan asked me about my knowledge of the case. And he took down on paper a statement which he wrote. I saw the statement and had an opportunity to read it but did not do so. He was writing out this statement at the table as he was talking to me and as I was answering the questions. The paper which you show me looks very similar to the one that Mr. Hogan had and might be the one. Mr. Hogan was drinking quite heavily. When Mr. Hogan handed the statement to me I told him I wouldn't sign any statement. I don't know that I objected to any of the statements contained in the paper. I had an opportunity to read it, and I knew he was trying to find out the facts for Swift. I answered his questions with respect to this very matter, and I knew he was trying to take down some sort of an account of what I was saying.

Thereupon the document referred to was marked Defendant's Exhibit A for identification. [91]

(Testimony of J. E. Harbinson.)

(Witness resuming) On that occasion in the presence of Mr. Hogan and Mr. Gould, I stated: "My name is Eugene Harbinson and I live at 916 Mission Way. I am 27 years of age and at the present I operate my father's ranch in Yolo County. I was employed by Swift and Company in July, 1934 until February, 1936. During this time I became acquainted with Harry Gray and Charles Gould. I roomed with them about four or five months. About one week before Harry Gray went on his vacation in October, 1934, I was sent out on the route with Harry to learn the route and his customers." I did not state, "On October 13, 1934, Mr. Gray advised me he was short in his accounts as the cashier, Mr. Hamilton, told him his money had not been accounted for." I did not say, "Gray made up a memorandum and gave me regarding his collections and told me to see the customers and find out the amounts paid." I did say to Mr. Hogan and Mr. Gould, "My conversation with Gray was on Saturday afternoon, and on the Monday morning following I went out on Gray's route. I remember the L. A. Market in which I asked for the tickets, and the lady asked me why I wanted them, and I told her Gray was short and I wanted to find out the amount." I did not say, "I recall Gray giving me a list of places to call on and find out the amounts. I called on several customers and checked their bills, and in each case what I told them was that I was checking accounts of Gray as he was on his

(Testimony of J. E. Harbinson.)

vacation and was short. I recall that Gray said to me that whatever the outcome was to wait until he came back."

I was present listening and taking part in the conversation on Saturday when Mr. Gray told Mr. Everett to wait until he came back whatever the outcome might be and whatever he might find out. [92]

Mr. Gould was present on that afternoon besides Mr. Hamilton, Mr. Everett, myself and Mr. Gray.

In nothing that I said that Monday morning and Tuesday morning on October 15 and 16 did I have any desire to hurt Mr. Gray or injure his reputation.

At this conversation with Mr. Gould and Mr. Hogan in Sacramento they asked me if I wanted something to eat. Mr. Hogan was writing on the paper while asking me the questions and while I was answering them, and when he was finished I said I wouldn't sign any statement. He handed me the paper, but I refused to read it. I didn't even read it. I told him that if Swift and Company wanted to see me I would be perfectly willing to go down and see them. I told him the true account of the situation at the time and answered his questions.

Redirect Examination

The reason I wouldn't sign this statement is that when we started the conversation, I told him I wouldn't sign any statement regarding this case. The conversation then took place and about an hour transpired before the request was made to me to

(Testimony of J. E. Harbinson.)

sign the statement. Drinks were being served during that time. I did not take any. Mr. Hogan did. I couldn't say how many he took. I would say that he seemed to act and talk under the influence of liquor.

Recross Examination

Mr. Gould was not under the influence of liquor, but I would not say he was sober.

There was no doubt in my mind about Mr. Gray that Saturday afternoon nor any doubt on Monday, October 15, and no [93] doubts at all on Tuesday, October 16, before I saw Mr. Gould and only a slight doubt afterwards.

Thereupon

EMMETT ARJO

was called as a witness on behalf of plaintiff, and he testified as follows:

Direct Examination

I reside in Palo Alto. My business is that of proprietor of a grocery store. I have been proprietor for six years. I know Harry Gray and Gene Harbinson. I have known Harry Gray since 1932. He used to call on me for Swift and Company serving me off the sausage truck. I first met Gene Harbinson in the month of October, 1934. I was introduced to him by Mr. Gray. He was supposed to relieve Mr. Gray while he went on his vacation. After the first introduction, I again met Mr.

(Testimony of Emmett Arjo.)

Harbinson the following Monday about six o'clock in the evening in my store. At the time he called there were a couple of customers there, but there was no conversation until after the customers left.

"Q. What was the conversation?

"Mr. Harrison: Object to that if the Court please, on the ground that it is hearsay, incompetent, irrelevant and immaterial.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception."

(Witness) Mr. Harbinson asked to see my sales tags. I asked the reason for it, and he said Mr. Gray had been accused of taking money from Swift and he was checking up to see how much I paid him. I replied, "I'm sorry; I had no cash dealings with Mr. Gray," that I had a weekly account. [94]

Cross Examination

I had known Mr. Gray for sometime before this incident. I had seen him frequently. He called three times a week. I became acquainted with him socially. We were on pleasant terms. I first heard about this suit against Swift and Company quite a few months afterwards when Mr. Gray stopped and said he was coming out to San Francisco. He asked me about the conversation with Mr. Harbinson when I talked with his lawyer a few months back.

My relations with Mr. Gray continued to be friendly at all times. I have always been friendly with him. I feel friendly toward him now. I believe he is an honest man.

(Testimony of Emmett Arjo.)

All that was ever said by Harbinson was that Mr. Gray was short in his accounts and that he had been accused of taking the money. I feel very friendly to Mr. Gray.

The conversation with Mr. Harbinson took only about three or four minutes.

Thereupon the plaintiff called as a witness on his behalf

FRED LANGBEHN,

who testified as follows:

Direct Examination

I reside in Redwood City, and I am manager of a Purity Store in Palo Alto. In 1934 I was a partner in the Best Buy Market in San Carlos. I know Harry Gray and Mr. Gould. I had a conversation with Mr. Gould subsequent to the time Mr. Gray went on his vacation concerning Mr. Gray.

"Mr. Harbinson: Just a moment. Are you asking for the conversation now, Mr. Welsh? [95]

"Mr. Welsh: Yes.

"Mr. Harrison: We object to that if the Court please on the ground that it is irrelevant, incompetent and immaterial and hearsay.

"The Court: Overruled. Exception.

"Mr. Welsh: Q. Proceed, Mr. Langbehn.

"Mr. Harrison: No evidence of authority proved. Exception."

(Testimony of Fred Langbehn.)

(Witness) Mr. Gould came in to check over bills of things we had bought from Swift and Company off their cold meat wagon. He asked if he could see the bills. I said he could but that we didn't have the bills in the store, that we had them at the house of Mr. Allen, my partners, a few blocks away. He said that he had a car and would take me out to Mr. Allen's house. I went up with him. On the way over there I had a conversation with him.

"Q. Just state what was said?

"Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent, immaterial, hearsay, and no authority proved).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception."

(Witness) He said the reason he would like to see the bills was it seemed Harry Gray had taken some of Swift's money just before he went on his vacation and they wanted to see just how much he had taken. Nothing more was said. When we arrived at the house, Mrs. Allen got out the bills, and Gould checked the bills we had there with the list he had in his little book. He checked the amounts and the bills with the totals in the book.

"Q. Did he make any other statements while he was going through the slips with reference to Mr. Gray? [96]

"A. Yes, he said——

"Mr. Harrison: Same objection, (that it is irrelevant, incompetent, immaterial, hearsay, and no authority proved).

(Testimony of Fred Langbehn.)

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"A. He said it sure looked kind of bad for Harry because it was here the day before he was supposed to go on his vacation and his cash was missing."

Cross Examination

I have talked with Harry Gray recently, and I feel friendly to him. He is a very nice fellow. We always thought he was. I always thought he was honest. I believe now he is honest. I always did believe it. When we were going over there in the car I don't remember whether I asked Gould why he wanted to see the bills or whether he just told me. I might have asked him first. Mr. Gould did not express any ill will personally on his part toward Mr. Gray. I had not known Mr. Gould before that time, and I did not know what his connection with the company was. It was the first time I had seen him. I don't remember word for word what was said. I have discussed this matter with Mr. Gray twice since this suit was begun. At lunchtime today Mr. Harbinson, Mr. Arjo, Mr. Gray, Mrs. Guptill and I all had lunch together.

I have never seen Gould since that time. He introduced himself as Joe Gould.

Thereupon plaintiff called

MRS. POLLY GUPTILL

as a witness on his behalf, and the witness testified as follows:

Direct Examination

I reside in Palo Alto. Prior to December of last [97] year my husband and I operated a restaurant in Burlingame. I know Harry Gray and Phil Gould. Mr. Gould used to come to my place and eat there. I recall in 1934 when Mr. Gray went on his vacation from Swift and Company. Subsequent to that time I had a conversation with Mr. Gould. He came into our place. There was present Mr. Guptill and Dorothy Hamilton, who worked for me. It was right after Mr. Gray was on his vacation, but I don't know the date.

"Q. Just go on from there. What did he say?

"Mr. Harrison: In order that the record may be clear, we object, if the Court please, on the ground that it is immaterial, irrelevant, and incompetent, and no authority proved; hearsay.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception."

(Witness) Mr. Gould asked to look over the receipts. I asked him why. He answered that the reason was that he was sent out by Swift because Harry was short in his accounts, and he wanted to check up on his cash sales slips. I let him see them. I wouldn't say how many days' or what slips he was looking for. He looked at plenty; for several months.

Thereupon the plaintiff called

MRS. DOROTHY HAMILTON KIPPS

as a witness on his behalf, and the witness testified as follows:

Direct Examination

In 1934 I was employed by Guptills in Burlingame. I knew Harry Gray and Phil Gould. Mr. Gould used to take some of his meals in the restaurant. I was present during the con- [98] versation between Mr. Gould and Mr. and Mrs. Guptill in October, 1934.

"Q. Just state what was said.

"Mr. Harrison: Same objection as already stated in the case of the last witness (that it is immaterial, irrelevant and incompetent, and no authority proved; hearsay).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception."

(Witness) Mr. Gould came in and asked to look over the accounts saying that there was a shortage and he wanted to see what Mr. Gray's accounts were with Swift. He stated that it was Harry Gray's accounts that were short.

Cross Examination

I feel friendly to Harry Gray. I respect him and like him. I believe he is honest and always have. I have had no grounds to doubt it.

Thereupon plaintiff called as a witness on his behalf

ARNOLD MONTEMAGNI,

and the witness testified as follows:

Direct Examination

I am a meat cutter. In October, 1934 I worked on B Street in San Mateo in my own market called "Monte's Meat Market". I met Harry Gray at that time when he was delivering for Swift. I knew Gene Harbinson who took over Gray's route.

"Q. Did you have any conversation with Mr. Harbinson in October of 1934 concerning Mr. Gray?

"Mr. Harrison: That is objected to on the ground that is already stated with respect to the last witness (that it is immaterial, irrelevant and incompetent, and no authority proved; hearsay). [99]

"The Court: Overruled. Exception noted.

"Mr. Harrison: Exception."

(Witness) About the time Mr. Gray went on his vacation, Mr. Harbinson took the route and came along and asked me if I could produce some sales tags for the previous week. He told me Mr. Gray was short in his accounts, that is, in collections, and he would like to check on it. I went home and got the sales tags for him and showed them to him when I got back.

Cross Examination

Mr. Harbinson did not say anything to me to the effect that Mr. Gray had been crooked or guilty of

(Testimony of Arnold Montemagni.)

embezzlement or anything to that effect. All he said was that he was checking up because Gray was short in his accounts. And he said that in answer to my question as to why he wanted those tags. As I recall he did not volunteer that remark until I naturally asked him why he wanted them.

The signature on this paper now shown me is my signature.

Thereupon the defendant offered said paper in evidence and it was received and marked as

"DEFENDANT'S EXHIBIT B."

It reads as follows:

> "San Mateo, December 1st, 1936. My name is Arnold Montemagni, residence 407 North C San Mateo. I knew Harry Gray, an employee of Swift & Company. Gray came to me and told me the company had accused him of taking some money. He said something about some money which was lost or taken just before he went on his vacation, and he was accused of taking it. He lost his job some time after his vacation, and about a year after this he said some other person had been convicted and he was going to sue the company. No other person from Swift & Company ever accused Gray of taking this money or any money. Some man from Swift & Company came to see me [100] later and said he wanted to see my receipts about the Gray matter, but this man never ac-

(Testimony of Arnold Montemagni.)

cused Gray of taking the money. This man from Swift saw me about two months after Gray first told me about it.

(Sig.) A. MONTEMAGNI."

Redirect Examination

I have no explanation that I want to make about that statement. No person other than Harry Gray from Swift & Company ever made any remark to me accusing Harry of taking the money. I recall my previous testimony. It was Mr. Harbinson who talked to me. He said he wanted to see my receipt, that Gray was short in his account; that is what I testified to yesterday, and that did occur. I say in this statement over my signature that no person from Swift and Company other than Gray ever accused Gray of taking money or any money. Both of those statements are true.

The written statement contains what I think is the truth and what I think really happened. I tried to explain it to the gentleman who came there just as closely as I could remember. I don't recall who got the statement from me. It was obtained from me at my mother-in-law's place.

Recross Examination

This written statement is correct the best way I can possibly recite it. No person from Swift and Company ever accused Gray of taking the money or any money; nobody has ever told me that. All

(Testimony of Arnold Montemagni.)
they ever asked was for the sale tags for the simple reason that Mr. Gray was short, and that was in answer to my inquiry as to why they wanted the sales tags. [101]

Thereupon the plaintiff

HARRY J. GRAY

was recalled as a witness on his own behalf and testified as follows:

Direct Examination Resumed

The system under which sales tags were issued to me and accounted for was as follows: I received these books from the man that was in charge of the supply room. Each time that he gave me the books they took the numbers down and each book was accounted for on their records. As I made sales down the Peninsula those tickets would naturally come back in either through the charge department or in the cash sales department. If a ticket was made out and something happened that the customer didn't want the goods or I happened to make a mistake and decided to put it on another ticket, I had to write "void" on that ticket, and be sure it came back in because of the fact that each one of those tickets was numbered on what they called a checkerboard system, and as it came back, when it did, whether it was a charge or it was a credit account, it had to be checked off in order to know that each ticket was coming back into the office.

In short, the sales tags were checked out to me and in effect charged to me, and then credited to me when they came back.

My receipt book was a pad containing sheets in triplicate; the original and duplicate were kept by the company and the tissue was returned to me as my receipt. They contained lines for the name of the town, for the customer, for the number of each sales ticket and for the cash collected.

When I put the receipt book, the cash sales tags [102] and the currency and checks into the cashier's window Saturday morning, October 13, 1934, I did not receive the receipt book again; neither it nor anything else was ever found.

The goods which I had on the truck were accounted for in the following manner: Every day they made a list of the goods I ordered and they kept a strict account of what was on the truck; at the end of each week they made out a report showing how much I had sold, how much was left on the truck, how much money I had, and they could account for practically every pound of goods.

After my return from my vacation and my conversation with Mr. Hartl and Mr. White, I talked to practically all of the customers I had formerly served from South San Francisco to Palo Alto.

"Q. Did you have any conversations with those customers as to what had been said about you while you were gone?

"Mr. Harrison: Object to that, if the Court please, on the ground that it is purely hearsay, ir-

(Testimony of Harry J. Gray.)

relevant, incompetent, and immaterial, not binding on this defendant. A statement to the witness cannot be a publication; all that this testimony would tend to prove would be a disclosure to this witness, except in so far as it would be purely hearsay.

"The Court: Overruled, exception.

"Mr. Harrison: Exception."

(Witness) I asked them to show me the tags, again. They were reluctant to do so because they had shown them to Mr. Gould and Mr. Harbinson and thought they had it all straightened out. They were rather cold and indifferent and failed to give me any cooperation as far as finding out what I wanted to know. Some refused to show me the tags and some [103] finally did. They wanted to know what Swift and Company had charged me with and how much money I had gone south with, what I had done with the new car I bought with the money and remarks of that type.

I came back and asked Mr. Hartl if I could go through the records again. No one else was present.

"Q. Give us the conversation with Mr. Hartl?

"A. I asked——

"Mr. Harrison: That is objected to on the ground that a statement to the witness can't be slander, if the Court please.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception."

(Witness resuming) I asked if I could check through the tickets again, and he refused me, saying that the case was closed; that they wanted that

(Testimony of Harry J. Gray.)

check that I had given them once, and he says, "As soon as you give us the check we will close this and forget all about it." So I went to Mr. Kelly and asked if he wouldn't do something about it to help me, because no one was giving me any cooperation getting to the bottom of it. So he finally talked to Mr. Hartl, and Mr. Hartl consented that I could look through the tags again.

I started to look through the tags, but after about five minutes interval, Mr. Hartl grabbed the tickets out of my hand and never let me have them again.

I had another conversation when I came back to Swift and Company and left them another check to make up the money that they said they would charge me with if I didn't make it up. I expected them to let me go back. I made the check out and said, "I go back on the job, don't I?", and Mr. White and [104] Mr. Hartl had a conversation, which I didn't hear, and they came back and Mr. White said "No, we can't put you back on the truck". I asked if there were any sales jobs on the sales force they could give me. They said they had nothing for me.

"Q. Mr. Gray, did you take any of this money that you collected on that Friday morning and keep it?

"Mr. Harrison: That is objected to on this ground: There is no claim in this case that this witness embezzled or took the money; there is no attempt to defend on that ground. The claim is simply

(Testimony of Harry J. Gray.)

that the statement that he was short in his accounts was true. And we submit that it is wholly immaterial, whether or not he took the money.

"The Court: Overruled.

"Mr. Harrison: Exception.

(Witness resuming) No, sir, I never collected any money for Swift & Company and failed to turn it in.

After that, I tried to find employment with some of the meat companies that operated down the Peninsula where I had gotten my experience, where I knew most of the managers of the different stores and markets.

"Q. Who was the first meat company you applied to for employment?

"Mr. Harrison: That is objected to, if the Court please, on the ground that it is irrelevant, incompetent and immaterial and has no connection with the slander charged. Now, there is no showing here and no showing has been attempted to be made that any disparaging remarks of any kind or character were made to any other employers. Counsel now is going into the question of what other employers may have done, and that will obviously open a very wide scope of inquiry. [105]

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) I first applied for employment at the Virden Packing Company at its offices

(Testimony of Harry J. Gray.)

in South San Francisco, and I talked with the Sales Manager, whose name I don't recall.

"Q. What was the conversation you had with the sales manager of the Virden Packing Company?

"Mr. Harrison: That is objected to as hearsay, incompetent, irrelevant and immaterial.

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) He told me to drop back in a day or two and he then told me that he had nothing for me.

I next applied to Cudahy Packing Company in San Francisco and talked either to the Sales Manager or the General Manager; I don't recall the name.

"Q. Give us the conversation you had with that man at Cudahy's.

"Mr. Harrison: Same objection, if the Court please, irrelevant, incompetent, immaterial and hearsay.

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) I told him the experience that I had; that I wanted to stay in the meat business; that I was willing and had an education and quite a foundation in the meat business; that I thought I could do them some good. He was very much interested in it. I dropped back in several days and spoke to him again and he said that he didn't have anything for me.

(Testimony of Harry J. Gray.)

I next applied in San Francisco to Hormel Packing Company, to the Sales Manager; I do not know his name. [106]

"Mr. Van Dyke: Give the conversation you had with the Sales Manager of Hormel Packing Company.

"Mr. Harrison: We object upon the same ground.

"The Court: Yes. Overruled.

"Mr. Harrison: Exception."

(Witness resuming) I told him about the same as I had told the other concerns, and he asked me to take this application and fill it out and he would talk to me, or I could just talk to the General Manager when I came back. I filled out the application and came back and talked to either the Sales Manager or the General Manager, either one of the two. On the first occasion I don't remember whether it was the Sales Manager; it was one or the other; I talked to both men. I asked the second man if I should leave my application blank that I had filled out and he said, "No, I'm afraid we haven't any place for you.

I then went to Hickman Products Company, the distributors for Best Foods products.

"Q. What happened there? Give the conversation you had with those people at Hickman Products Company.

"Mr. Harrison: My objection goes to this conversation, too, if the Court please.

"The Court: Yes. Overruled.

"Mr. Harrison: Exception."

(Testimony of Harry J. Gray.)

(Witness resuming) I told him my experience down the Peninsula, that I had been running a truck similar to the one that they had down there. I came back later and he said that they had nothing for me.

I then answered an advertisement for a salesman with the Zee and Zoe, a Zellerbach subsidiary. They answered my letter and I went out to see them. [107]

"Q. Give the conversation at Zee and Zoe.

"Mr. Harrison: We object to the conversation on the grounds already stated.

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) He told me he was considering three men, of whom I was one. He also asked me to come back the following day, and he would give me his answer. I came back the following day, but he said, "I am sorry, Mr. Gray; we have given the job to some one else.

I then worked a week or ten days with the Hoover Vacuum Company on a strictly commission basis. As I did not make expenses, I did not stay with the job. I then went to Los Angeles and obtained employment after four or five months.

After I decided that they had found the man that I had accused all along, I went to Swift & Company in Los Angeles and asked employment there. I spoke to the General Manager of the Los Angeles plant. He was interested to know that I had spent

(Testimony of Harry J. Gray.)

time in the plant and with the sales force with Swift & Company up here. He said, "We are looking for a man of your type and ability, and would you come back and see me in about a week or ten days?" When I came back he said, "Gray, we have investigated your record and I am sorry but we don't have anything for you."

I also applied at the Cudahy Packing Company in Los Angeles and the Houser Packing Company in Los Angeles.

"Q. Did you get employment at either Cudahy or Houser in Los Angeles?

"Mr. Harrison: Object to that on the ground that it is immaterial, remote and having no connection with the slander complained of. [108]

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) No, sir. I did not get employment after I left San Francisco until June 1935. I obtained employment with the Carnation Milk Company, as a milkman, and worked until April 1937. I came back to San Francisco and talked with the officials of Swift & Company on two different occasions. The first time was after I learned in the paper about Jack Hamilton's trouble; that was in April 1935. I talked with Mr. Hartl at Swift & Company's plant, but with no one else.

"Q. What was your conversation with Mr. Hartl about the matter?

(Testimony of Harry J. Gray.)

"Mr. Harrison: Object to that on the ground that it is irrelevant and immaterial.

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) I told Mr. Hartl that I had just come from interviewing Jack Hamilton down at his home near Santa Clara. And he asked me what Mr. Hamilton had said. I told him that I had accused Jack Hamilton point blank of being the man that framed me all along; that I wanted him to admit his guilt against me and straighten me out after he had caused all the trouble for me. Mr. Hartl said, "Gray, what did he say?" I said, "He just wouldn't admit it. He said he was on leave of absence and there was no trouble with Swift & Company." So Mr. Hartl said that he never believed that Hamilton was guilty of all that they had charged him with, because he was one of his very best friends. I asked him to reimburse me with this money I so willingly paid when all this trouble arose. He said, "Until Hamilton admits he stole it from you, we can't do a thing about it." [109]

I went to Los Angeles, and came up again after they had finally charged Jack Hamilton with embezzlement. I first went to the Swift plant and saw Mr. Hartl.

"Q. Give the conversation.

"Mr. Harrison: My objection goes to this as irrelevant, incompetent and immaterial.

"The Court: Yes. Overruled.

(Testimony of Harry J. Gray.)

"Mr. Harrison: Exception."

(Witness resuming) I asked him again if he would reimburse me and he said "Gray, it is entirely out of my hands. I would advise you to go to see Mr. Smart, our attorney."

"Q. Did you go to see Mr. Smart?

"A. I went to Mr. Smart, Swift & Company's attorney, and told him, explained the case to him.

"Mr. Harrison: This is objected to, if the Court please, as immaterial.

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) And Mr. Smart said that there was nothing that he could do but advise me to go and see Jack Hamilton's attorney, which I did. I went to Jack Hamilton's attorney and demanded that he——

"Mr. Harrison: I object to this as dealing with a matter that obviously has no bearing on the controversy between this plaintiff and the defendant, if the Court please.

"The Court: Overruled.

"Mr. Harrison: Exception.

"Mr. Van Dyke: Go ahead."

(Witness resuming) I demanded of Jack Hamilton's attorney that he make up the money he had stolen from me, which he said he [110] didn't know anything about. I in turn went to Redwood City where Hamilton was in jail. I had a talk with Hamilton and then returned and talked to the Dis-

(Testimony of Harry J. Gray.)

trict Attorney. I did not go back to Swift & Company. That was the last time I saw them.

At the time I lost my job at Swift & Company, I was getting $37.50 a week.

Cross Examination

I now reside in San Jose and have lived there since October, 1937. I am a salesman with Johnson Wax Company. I went to work for them in September 1937 and receive $140.00 per month.

I first went to work for Swift & Company in January 1933. I first went on this truck route in October, 1933. In the meanwhile I was working in the plant. There were approximately 100 or 125 customers on the route; one-third cash customers and two-thirds charge; approximately thirty-five cash customers. They extended from South San Francisco to Palo Alto and Mayfield.

In December 1934, I worked for the Hoover Company for [111] ten days or two weeks. I voluntarily left the Hoover Company. I went to Los Angeles January 2, 1935. My employment with Swift and Company terminated on October 29, 1934. I cannot recall the names of any person to whom I applied for employment in November. When I went to Los Angeles I began to seek employment immediately. I was employed by the Carnation Company there in June, 1935, and I earned on an average of $124 to $143 a month with them. I worked for them until March, 1937. I was not employed from March to September, 1937.

(Testimony of Harry J. Gray.)

Going back to Saturday afternoon, October 13, 1934, after searching in the office I made a search in my room to see if any of the receipts had been left there. When I went to the room I saw Mr. Gould. I had no conversation with him in the room. He was in the room with me while I made the search. At one time he had been a room mate of mine. At that time Mr. Harbinson was my room mate. My relations with Mr. Harbinson and Mr. Gould were friendly at that time. I had gone on social affairs with Mr. Gould a few times.

At the time I say I threw the money into the cage on Saturday morning, nobody was with me.

The list you now show me is the list of customers which I wrote out that Saturday afternoon.

Thereupon the defendant offered the list in evidence and it was received and marked

"DEFENDANT'S EXHIBIT C."

It reads as follows:

"1. L. A. Fruit Market, Burlingame, Broadway.
2. Peninsula Fruit, San Mateo, 5.69 check.
3. Palm Market, San Mateo 4.
4. Larry's Grocery San Mateo.
5. Belmont Cash Market 3.31.
6. Best Buy Market San Carlos.
7. Sequoia Market, Redwood, 2.91.
8. Roosevelt Market, Redwood, 2.73.
9. Halletts, Redwood, 3.43. [112]
10. Dumbrach, Redwood, 2.97.

(Testimony of Harry J. Gray.)

11. Economy Market, Menlo Park.
12. Pantry Shelf, Palo Alto.
13. Arjo Tavern, Beer Tavern.
14. Aubrey's Dele., 4.62."

(Witness resuming) Defendant's Exhibit C is in my handwriting. It was written by me that Saturday afternoon. I drew up that list with the intention that someone should check the route.

When I came back to see Mr. White after that first interview, I asked him whether I could have the route. He did not directly offer me a job, but about ten days or a week afterward I heard either through Mr. Gould or Mr. Harbinson that I could probably find a job in the plant. I did not then go back and ask for a position.

That Saturday afternoon, October 13, after ransacking the baskets and finding no trace of any tickets or anything, Mr. Everett said, "Mr. Gray, what do you propose to do about this?" I said, "Irving, it looks like a case where the money is gone. There is nothing that I can possibly do. I will give you a list of all people that I collected from yesterday. I can give you the approximate amount of the money that I collected from each one. Mr. Harbinson was with me, and he will remember, and that will be a double check. I will give you this list, and let you check it, and find out how much it is. I have a check coming for a week's salary and the week you have given me

(Testimony of Harry J. Gray.)

for a vacation. That is enough to cover this amount," which I thought was around $60.00. "I realize the money is gone; that I haven't a receipt to show you for it; but naturally I have to make it good, and as long as I have that much money here you don't have to worry about me, and I am not running away; in fact, I am coming back, and I would like to get to the bottom of it." [113]

I just volunteered to give the list to Everett.

I knew that it was the rule of Swift and Company that any money collected during a given day should be turned in that night. I worked on the route for approximately a year. During the last seven months I put the money in the cage the morning following collection, and I did not turn the money in at night. During the first months I left the money at night with the night order clerk about one-third of the time, but took it home about a third of the time. The night order clerk was Lloyd Deering.

With respect to the system that they were using down there, I had a collection book; also invoices or sales tags. When I turned in a day's collections I turned in with it to the company two of the three copies of sales tags, if it was a paid account, one being left with the customer. I never filled out the names of the purchasers on the stubs.

The collection reports are also in triplicate, one copy a white, one a yellow and one a tissue. For each town two copies were turned in to the com-

(Testimony of Harry J. Gray.)

pany and one was either retained by me or came back to me for my own records. The system was that the salesman at the end of the day was supposed to turn in to the credit department the invoices for the credit sales and was supposed to turn in with his cash and checks the two invoices for the cash sales and also his collection report.

I usually got back from work about 7:30 in the evening. Sometimes Mr. Deering, the night order clerk, was there and sometimes not. Most of the time he was there at 7:30. I decided after the first few months that I would not turn the money over to the night order clerk because I could not get a receipt, but I would turn it in the morning, keeping it over [114] night. When I turned it in the mornings, I did not get a receipt then because no one was there to give me a receipt before I started on the route.

After I went down the peninsula on October 29, 1934, or within a few days thereafter, and had the conversations with the people on the route, I did not tell Mr. Hartl or any other officer of the company that I had been slandered.

Mr. Hartl never said to me that I had stolen any money; what he said was that I was suspended from the company; that he had wired to Chicago and that I was suspended, and that I was short, and my accounts came to some $150, and it was up to me to make it up. He did not say I had stolen

(Testimony of Harry J. Gray.)

any money; he said my accounts did not balance, that I was short.

On October 29, 1934, I drew my checks in favor of Swift and Company in the sum of $58.73 and then had payment on it stopped, after I had delivered it to Mr. Hartl.

The letter you show me from Swift and Company, per J. A. White, dated March 4, 1935, was received by me shortly after its date.

Thereupon the said letter was offered in evidence by the defendant and received and marked

DEFENDANT'S EXHIBIT "G".

It reads as follows:

"March 4, 1935. Mr. Harry J. Gray, 480 North Orlando, Los Angeles, Cal. Dear Sir:

"While I was very glad to receive your letter, I am somewhat surprised that you are reopening the incident that occurred some time ago, as we were under the impression that we had satisfied you of the fact that you were innocent of any attempt to defraud the company but were only careless in the handling of your accounts. As far as we are concerned, the matter is closed.

"Should you happen to be at San Francisco at any time, we will always be glad to have you come in and see us.

"Very truly yours,
SWIFT & COMPANY,
Per J. A. WHITE." [115]

(Testimony of Harry J. Gray.)

(Witness resuming) This other letter you show me is in my handwriting. It was written shortly before March 4, 1935. Mr. White's letter, Defendant's Exhibit G, was in answer to it.

Thereupon said letter was offered in evidence by the defendant and received and marked

DEFENDANT'S EXHIBIT "H".

It reads as follows:

"Harry J. Gray,
480 N. Orlando,
Los Angeles, Calif.

"Mr. James White
Swift and Co.
South San Francisco.

Dear Mr. White:

Well, here I am back again! As I said once before—'I won't give up until the mystery is solved.'

A rumor drifted down from South City the other day, which held considerable interest for me. I understand that Jack Hamilton and his books are under a rigid investigation. I feel that if this is true, I can play a big part in helping Swift & Co. prove that there is 'something wrong going on inside that cashier's cage.'

Here's what I'm willing to do, Mr. White—I'll go to the expense of making a trip up there

(Testimony of Harry J. Gray.)

to help Swift and Co., and I only ask two things of you—'that right down in your heart you believe me innocent of the trouble in October (which I am); and that you are now willing to listen to my story concerning Jack Hamilton.' If you will consent to do this I will convince you or any jury, within fifteen minutes time, that Jack Hamilton—and no one else—is the person who caused all my trouble in October and probably the one who is causing all your trouble at the present time.

I shall be awaiting a reply in the near future.

Sincerely,

HARRY J. GRAY."

(Witness resuming) In this matter of the receipts: after I decided to keep the money over nights and turn it in in the mornings, when I turned it in in the morning I did not [116] get any receipt. When the money would reach the proper source, I would get back the tissue in this collection report, sometimes a day or sometimes two days later. I used as many as three or four different receipt books. When I got them back my receipt was in the form of a stamp marked "Paid" or "Received" on the tissue. The only receipt I got was my collection book in the form of a tissue.

In the early months when I used to observe the company rule and turn in my money to the night order clerk, I would give him my collection book

(Testimony of Harry J. Gray.)

and I would receive my tissue with the mark "Paid" later. I would get it two or three days later in exactly the same form as I got it when subsequently I kept the money over night in my room. During the period of three or four months when I left the money with Mr. Deering a third of the time, every night when I went in, I asked him for a receipt and every night he refused.

I testified on direct examination about going down on the Peninsula to see some of these customers after I had examined the company records, and I spoke about certain remarks they made to me. I called on 45 or 50 of them. As to those who made these remarks to me, I can recall the names of Mrs. Guptill and Mrs. Kipps, and Kenny Angus at the Peninsula Market; he is no longer there. Angus said to me, "Well, did you go south with your dough, or didn't you?" A butcher named Bud Joos used to call me "Jesse James," and there was a fellow named Jack in the Sequoia Market in San Mateo.

I am now doing business in the same territory with some of the same people.

As to who else besides Angus and Joos and the people at Guptill's coffee house made these opprobrious remarks, well [117] this chap Larry that owned this grocery store, he was one of several that made them. That is Larry's Groceteria. The remarks he said was: "Did you have a good time on

(Testimony of Harry J. Gray.)

that money that you went south with?" I can't recall the name of anyone else who made remarks. There was the manager in the Nelson Meat Company, but I don't know his name. I don't recall what he said. The people in Guptill's cafe were good friends of mine.

"Mr. Van Dyke: We have never said that they spoke in an opprobrious manner or took them seriously or anything of the sort. That is Mr. Harrison's designation."

(Witness resuming) Mrs. Guptill did not apply terms such as "Jesse James" or "John Dillinger" or anything of that sort.

Redirect Examination

The check now shown me was signed by me and given to Swift and Company to take the place of the check upon which payment was stopped.

It was a company rule to turn in my money and get a receipt for it. The instructions were to turn the money in to the cashier. I think I spoke to Mr. Kelly and asked him why I couldn't get a receipt. He said, "Why won't Lloyd Deering give you a receipt?" I replied, "I don't know; he just won't give me a receipt regardless of what I do or say. He has the money. He says he would be responsible for it if he gave me a receipt, so he isn't going to be responsible for it."

During the period of six or seven months when I had ceased turning the money over to the order

(Testimony of Harry J. Gray.)

clerk and was turning it in the next morning, nothing was said about it being a violation of the rule. [118]

This collection report is what I have referred to as my receipt book. The collection book sheets were not charged out to me by number or anything of that sort, but the invoice books were. Each time an invoice book was given me I was charged with the total number of tags that were in it. They had a checkerboard system to see if I returned to them all the sales tags. I had to account for each ticket.

Recross Examination

I say I did not turn the money into the night order clerk in the later months because I could not get a receipt. The reason I turned it in the following morning although there was nobody there to give me a receipt then was that it had to be turned in some time. When I turned it in in the mornings, there was no man to receipt for it. The cashier usually got it later. Mr. Everett was usually in the office at that time in the morning. I did not hand the money to him but would comment to them that I had left it inside the cashier's office. There was always somebody around, except that single Saturday morning. I knew that Mr. Everett had nothing to do with the money, that it was not in his department, that he had duties of his own in the sales department.

Thereupon the plaintiff rested.

Thereupon counsel for the defendant made a motion for nonsuit and dismissal as follows: "The defendant in this case moves for a judgment of nonsuit, or dismissal, on the following grounds: First, that it appears affirmatively from the evidence that the utterances complained of are privileged in character, and that under the provisions of Section 47 of the Civil Code [119] of California and under the Common Law, no cause of action arises therefrom; inasmuch as it appears by uncontradicted testimony that the only communications here made were communications without malice to a person interested therein by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent; or, three, who is requested by the person interested to give the information."

Thereupon the said motion was denied by the Court, to which ruling counsel for defendant then and there excepted.

Thereupon defendant called as a witness on its behalf

LAWRENCE LEWIN,

who testified as follows:

Direct Examination

I reside in San Francisco, and I am employed by the City and County of San Francisco in the con-

(Testimony of Lawrence Lewin.)

troller's office. In the year 1934 I was in business in San Mateo in a grocery store known as "Larry's Groceteria." My first name is Lawrence, and I am called Larry. The shop was my own. I was one of the customers of Swift and Company. In the year 1934 I had a call from somebody from Swift and Company with respect to checking up on some of my records. I did not recall the name of the man until today when I met him in the hall and recognized him instantly. It was Mr. Gould.

Mr. Gould called on me that particular day and asked me if I had any information relative to a certain item I had purchased from them. I looked up my files on the matter and [120] pulled it out and showed it to him. He asked if it was all right if he could keep that bill and I said it was. He did not on that occasion say anything about any employee or former employee of Swift and Company. I never heard from Mr. Gould or any employee of Swift and Company any statement disparaging another employee or former employee.

Seeing Mr. Gray in the court room, I think I recall him now.

I never said anything to Mr. Gray to the effect that he had gone south with some money or anything to that effect. I never said anything to him disparaging his character or honesty.

(Testimony of Lawrence Lewin.)

Cross Examination

I met Mr. Gray calling at my store. He called there regularly for a period of just a few months. He called on me regularly twice a week. I do not remember who took his place because Swift and Company soon stopped calling on me entirely and I was dealing with another house. They ceased calling on me after Mr. Gray was driving. I do not recall by name the man who was driving at the time they ceased calling on me.

I never heard anything about the charge that Mr. Gray had been short in his accounts with Swift and Company. I never heard a thing about it.

When Mr. Gould came to me, he asked to see if I had some records on an item I had purchased from Swift. It was a cash transaction. I did not ask him why he wanted the information. He led me to believe that he was more or less checking up on something, that is, just checking accounts, and he asked me if I would give it to him, and I was more than willing to [121] cooperate with him. The accounts which he was checking, he said, were the company's own books. He did not tell me why he was checking it up.

I do not recall whether I asked him why. He did not mention the name of Gray at all.

Redirect Examination

The driver who succeeded Gray on that route did not make any remarks to me about Gray or his character or conduct.

Thereupon the defendant called as a witness on its own behalf

MAURICE HOGAN,

who testified as follows:

Direct Examination

I reside in Los Angeles. I am an investigator and I am also admitted to practice law. In 1936 I did some investigating work for Swift and Company.

Defendant's Exhibit A for identification, aside from the signature of Mr. Gould, is in my handwriting. It was made by me in December, 1936, at Sacramento, in the presence of Mr. Gould and Mr. Harbinson in a restaurant near the Senator Hotel around twelve o'clock noon. Before writing it, I had a conversation with Mr. Harbinson. I told him that I wanted to talk to him about a suit that had been instituted against Swift and Company by Mr. Gray and asked him if he knew anything about the circumstances about the suit, and he said he did. I asked him what he knew about it, as to whether or not he heard any people make any remarks about Mr. Gray being short in any accounts. I made a memorandum of the statements he made to me on that occasion. Defendant's Exhibit A [122] for identification is that memorandum. I made that memorandum while he was telling me about it. He gave me his name and where he lived and so forth, and I would ask him the questions, and he would answer the statements, and I would reduce it to writing. After I finished writing it, I read this

(Testimony of Maurice Hogan.)

memorandum, Defendant's Exhibit A for identification, aloud and asked if that was correct, and he said it was. He said, "I wish to read it." I gave it to him, and he read it over. I asked him if he would sign that statement of facts, and he said he would not. He just said that that was the statement of facts as near as he remembered the circumstances, and that was approximately all that was said in that respect.

Thereupon the defendant offered in evidence said document previously marked Defendant's Exhibit A for identification, and it was received and marked

Defendant's Exhibit A

in evidence, and reads as follows:

"Sacramento, Calif.

December 3rd, 1936.

"My name is Eugene Harbenson and I live at 916 Mission Way. I am twenty-seven years of age and at present I operate my father's ranch in Yolo County. I was employed by Swift & Co. from July 1934 until February 1936. During this time I became acquainted with Harry Gray and Charles Gould. I roomed with them about four or five months. About one week before Harry Gray went on his vacation in October, 1934, I was sent out on the route with Gray to learn the route and his customers. On October 13th, 1934, Mr. Gray advised me

(Testimony of Maurice Hogan.)

he was short in his accounts as the cashier Mr. Hamilton told him his money had not been accounted for. Gray made up a memo and gave me regarding his collections and told me to see the customers and find out the amounts paid. My conversation with Gray was on Saturday afternoon and on Monday morning following I went out on Gray's route. I remember the L. A. Market in which I ask for the tickets and the lady ask why I wanted them and I told her that Gray was short and I wanted to find out the amount. I recall Gray giving me a list of places to call on and find out the amounts. I recall calling on several customers and checking their [123] bill and in each case what I told them was that I was checking accounts of Gray as he was on his vacation and was short. I recall that Gray said to me that whatever the outcome was to wait until he came back.

"This statement taken in the presence of Mr. Chas. Gould and M. P. Hogan and the same was true and correct.

"Witness M. P. HOGAN
CHAS. GOULD."

(Witness resuming) On that occasion during that conversation, I was sober. I had had two drinks that day. This restaurant had a bar in connection with it, and when we arrived there about 11 or 11:15, I had a gin fizz. I had another before lunch. I was

(Testimony of Maurice Hogan.)

not conscious of any effect as far as clearness of mind was concerned. Mr. Gould on that occasion was sober. I think he had a glass of beer with his lunch. He was perfectly sober.

Cross Examination

I was there about one and a half hours. Besides talking about this matter, Gould and I had lunch. I cannot recall whether the conversation was before or after lunch.

Before going up there to see Mr. Harbinson with Mr. Gould, I talked to a lot of people about this case. I talked to Mr. Kelly and to Mr. Smart. I did not talk with anybody about taking this statement from Mr. Harbinson. I happened to go up there because it was part of the investigation. Mr. Smart put me on the investigation. He is with Swift and Company, and I talked to him about it. I discussed with him the facts I had gathered during the investigation. Mr. Smart did not suggest to me what he wanted me to inquire about when I saw Harbinson. He told me to make an investigation of the entire case and did not mention Harbinson in par- [124] ticular or tell me what to ask him.

Prior to December 3, 1936, I had been on the investigation about five days working down the Peninsula, talking to members of the concerns on Mr. Gray's route.

I wrote this statement as I went along during the course of the conversation with Mr. Harbinson. The

(Testimony of Maurice Hogan.)

statement appearing on it, "This statement taken in the presence of Mr. Chas. Gould and Mr. Hogan and the same is true and correct," was written by me after he had handed it back to me and said that he would not sign it. I then asked him "That is true and correct?" and he stated, "Yes," and I wrote on it that statement in his presence. He refused to sign it, but he did state it was correct after reading it. He did not say he refused to sign it because it was not correct. What he did say was "I want to be fair to Swift. I want to be fair to Mr. Gray. I do not want to get involved in this litigation because I do not want to testify. I might say something that might hurt one or the other, and the facts are facts, those are the facts as I know them, but I do not care to sign the statement." I did not offer to give him a copy of the statement, and he did not ask me for a copy. If he had asked me for a copy, he could have had one. It is not the general practice in taking statements of people in making investigations to give a copy of what they sign to them unless they ask for it. I signed it immediately after it was read to him. I said, "You acknowldege this as correct?" He said, "Yes, everything in there is the fact as I know it." Then I wrote that down and witnessed it.

Mr. Harbinson did not give me any other names at that time other than the lady in the Los Angeles Market. He did not tell me what places he had called on. I asked him what places [125] he had called on, but he said that he could not recall.

Thereupon the defendant called as a witness on its behalf

IRVING EVERETT,

who testified as follows:

Direct Examination

I reside in Redwood City and am employed by Swift and Company. I was in 1934 assistant to Mr. Kelly, the sales manager at South San Francisco.

The general duties of the sales manager were to supervise and promote sales in the territory from north of Fresno to the Oregon line. The sales manager had nothing to do with discrepancies in accounts or checking of accounts. That fell to the plant auditor, Mr. Hartl.

I recall a Saturday in October, 1934, just before Mr. Gray went on his vacation. Mr. Kelly was in Chicago at that time.

I saw Mr. Gray on the afternoon of that Saturday, October 13. I had come back from lunch about one or shortly thereafter and gone to my desk to clean up various details that were left until the afternoon. I don't know how long I had been there but eventually I heard Mr. Gray and Mr. Harbinson at the back of the office near the desk of the cashier's cage discussing a shortage or the fact that he had placed his envelope in the cage and it was not there. I don't know whether they invited me into the conversation or whether I, for curiosity's sake, got up and went back to the back of the room to see what it was all about, but at any rate I got back

(Testimony of Irving Everett.)

there and Mr. Gray and Mr. Harbinson were still there. Mr. Gray was excited about the fact that Mr. Hamilton had told him that this [126] envelope was not there when he came that morning, and, as I recall it, about that time Mr. Hamilton walked from the back of the office over towards the cashier's cage and there was some discussion between Mr. Gray and Mr. Hamilton. I don't remember the exact words, but it was Mr. Hamilton confirming the fact that the envelope was not there. About that time, or very shortly after, Mr. Gray and Mr. Harbinson left there and went over to the hotel room. They might have been gone as long as an hour, possibly less. In the meantime, I went back to my desk and went to work. Shortly afterwards they came back and Mr. Gould was with them, who had learned about this loss of the envelope, and all three of them came in and engaged themselves in a search for this envelope. I don't remember any of the details of the search other than I do remember Mr. Gould looking in the waste basket for the envelope. At that time I finished my work and went home, and that was the last I knew of it on that day.

I did not notice Mr. Gray writing out a list. I did not see any writing done. Prior to the last few weeks in connection with the preparation for this trial, I had never seen the paper which has been introduced in evidence here as Defendant's Exhibit C.

I never gave Mr. Harbinson any directions about checking this route. I never discussed that subject

(Testimony of Irving Everett.)

with Mr. Harbinson at all. I never discussed this list, Defendant's Exhibit C, with Mr. Harbinson. I am sure about that. I recall no occasions on which Mr. Gray in the mornings would speak to me about the deposit of his money in the cashier's cage. I very seldom saw him mornings. [127]

Cross Examination

I generally get to my office about seven-thirty in the morning. I never saw Mr. Gray put his envelope into the cage. I was never working near the cage, as my back would be turned toward it, four desks away. I do not know that he ever did put his envelope into the cage.

Mr. Gray was under the supervision of the plant sales department, and I was assistant in that department. As assistant manager, I had some authority over Mr. Gray. When the manager was away, I had pretty complete control over him.

I did not know directly or by rumor that he sometimes put his money in the cashier's cage in the morning. I did not even learn of it by hearsay, until after the present suit had arisen, and when it was being investigated about six weeks ago.

Referring to that Saturday afternoon when I heard Gray and Harbinson talking to Hamilton, I did not join in the conversation at all. I had nothing to do with it. I heard Mr. Hamilton tell Gray that he had not turned in his money. I listened to the conversation and heard it mentioned that Gray claimed to have put his money there in the

(Testimony of Irving Everett.)

morning. I did not hear at any other time that he had put his money there in the morning in the cashier's cage. When I heard it that time, I knew that it was not according to the rule. I did not ask Gray anything about why he had violated the rule. I made no comment nor asked any question about it. I did not see anybody make a search in the cage. I saw Mr. Gould look in a wastepaper basket outside of the cage two or three desks away.

I heard that they were looking for a supposedly lost envelope containing money and that it was Gray's envelope they [128] were looking for. I knew it was receipts for the previous day they were looking for and that Mr. Hamilton claimed he never got it, also that Mr. Gray claimed he put it there before Hamilton came that morning. I did not join in the conversation or comment on this being a breach of the rule.

I paid no attention to the matter from that time on, either officially or privately. I had no part in the case whatever. I was not present at any conversation concerning it wherein Mr. Hartl and Mr. Kelly were present. I never heard it discussed with any of those people. I never discussed it with Mr. Kelly. I had no discussions about it. I don't know whether the money was ever found, except what I have heard since this case came up. I don't know whether Gray's successor on that route put the money in the cashier's cage in the mornings.

I did not tell Mr. Harbinson when he left that Saturday afternoon that I wanted to see him on

(Testimony of Irving Everett.)

Monday. I did not talk to him that Monday, and I did not tell him to check the list of sales of the previous Friday. I had positively nothing to do with any investigation as to what had happened or who had been sold that Friday.

On that Saturday afternoon when Gould, Harbinson, Gray and Hamilton were searching around, I did not hear them say what was in the envelope. I knew there would be money in it if it was the previous day's work and that there would be tags to go with the money, but I was not particularly interested as to whether or not there was some record of the sales.

I never discussed with Mr. Hamilton what they were doing that morning. I never discussed afterwards whether or [129] not they had found the money. Mr. Hamilton did not at any time afterwards report to me that Mr. Gray had not turned in his collections.

Mr. Kelly came back sometime after that Saturday. In his absence the responsibility of the department was mine. That is, I did everything when Mr. Kelly was away that Mr. Kelly did when he was there. I knew Mr. Gray was going on vacation on the Monday following. I had no discussion with him about his going on that vacation. His vacation had been scheduled before Mr. Kelly left. The man to relieve him was selected by Mr. Kelly, and that man had been put on the route by Mr. Kelly about

(Testimony of Irving Everett.)

three days before to get his instructions from Mr. Gray for handling the route in his absence.

I was not particularly interested in whether or not the man who had not turned in his collections was going on vacation. He did not ask me about going on his vacation notwithstanding this trouble had arisen.

When he came back from his vacation I had no conversations with him at all about the matter of the missing money. The only conversation I ever had with Mr. Gray was long after that, after he had returned from Los Angeles, when I met him in the yard in front of the plant.

Mr. Gray on returning from his vacation did not go back to work with me. I never made any inquiry why. I knew without asking that he would not go back to work on the route until the discrepancy was cleared up. I knew that according to the rules. I knew there was a discrepancy when Gray left. [130]

Redirect Examination

When Gray's vacation expired, Mr. Kelly had already returned, and after Mr. Kelly's return, Mr. Kelly was in charge of the salesmen. I had no responsibility at all with respect to the retention of salesmen after Mr. Kelly's return.

On Saturday afternoon, October 13, when I heard this conversation I knew that Gray was going on his vacation, and before I had any occasion to

(Testimony of Irving Everett.)

exercise any control over him at all, Mr. Kelly had returned.

There were two reasons why I did not take any particular interest in following up, as a matter of personal responsibility, the matter of this discrepancy they were talking about. In the first place, Mr. Gray was going on his vacation; the sales manager, before he left, had already given him his vacation and selected the relief salesman, and there was nothing for me to do. Had a discrepancy occurred at a time when this man was not going on his vacation, and the sales manager had been away, then it would have been up to me to have replaced the man on the route. That was one reason. The other reason was that there are definite instructions in Swift and Company to their sales department, that when discrepancies or shortages, or anything of that nature, occur on the route, the sales department has positively nothing to do with it, that man automatically comes under the jurisdiction of the plant auditor and the only part we play is replacing the man on the route. The plant auditor tells us that he is going to take the man off the route and we have nothing to do except to replace him with a suitable man. [131]

Recross Examination

The plant auditor did not tell me he was taking Mr. Gray off the route, and I do not know whether he told Mr. Kelly. Mr. Gray was a salesman on

(Testimony of Irving Everett.)

the force and I used to see him come in and talk to Mr. Kelly occasionally. I used to see him in and out of the office, but other than that I did not know him personally at all.

Redirect Examination

In case a discrepancy occurs of this character, the matter of checking up on the discrepancy falls within the jurisdiction of the auditor's department and not that of the sales manager's department.

Thereupon the defendant called as a witness on its behalf

CHARLES PHILLIP GOULD, JR.,

who testified as follows:

Direct Examination

My name is Charles Phillip Gould and not Joe Gould. I reside in the San Joaquin Valley near Ripon. My occupation is taking care of a ranch. I ceased to be employed by Swift and Company about two weeks ago.

I know Harry Gray, the plaintiff. In 1934 we were both employed by Swift and Company at their South San Francisco plant. We both lived that the Livestock Yards Exchange Hotel, across the road from the office of Swift and Company.

(Testimony of Charles Phillip Gould, Jr.)

He and I were room mates for six to eight months. We were on very friendly terms and went out socially together. [132]

I recall the Saturday afternoon in 1934 just before Gray went on his vacation. I first saw him that day about 2:00 or 2:30 in the afternoon somewhere in the hotel. He was rather excited and came in and searched his room. He came into the lobby and I went upstairs with him. He made some statement to me and I was in the room while he was searching. I helped him. We went through the drawers, looked in one of the trunks, behind the trunks, under the mattress and various places in the room.

During the time I had been rooming with him, I had been present frequently on occasions when he came home at night with his collections. I knew that on occasions he kept his collections in the room. Sometimes he would make out his reports, put them in an envelope, and turn them in the next morning to the plant. Over night he would seclude it in the room under the pillow or throw it on the dresser top or in the dresser drawer or lay it somewhere where he could remember.

Coming back to that Saturday afternoon, after he and I had done the searching, we went over to the office. I don't recall whether Mr. Harbinson came in with us. The only person I can remember of being in the office when we got there was Jack Hamilton, cashier. Sometime while we were in the office Mr. Harbinson was there. I talked to

(Testimony of Charles Phillip Gould, Jr.)
Jack Hamilton first and to the janitor. I asked if he had emptied all of the waste paper baskets, and he had, and I went outside to search the trash cans wherein I thought the missing tickets or missing stubs might be.

I recall that Harry Gray wrote out a list of names and the amount of money which he could recollect approximately of these tickets that had disappeared. He gave this list [133] to Mr. Harbinson and told him in substance to take this list, see the customers and check up as to the amounts, and that when Grey returned from his vacation he would make up the difference to the company if they so demanded. It was Gray who told Harbinson that, on that afternoon.

On Monday, October 15th, about 10:00 or 11:00 o'clock, Mr. Zigler called me up. Mr. Zigler was in charge of the Bedaux Department in the plant and was my superior. He said that Mr. Hartl over in the office wanted to see me. I went over to see Mr. Hartl after lunch. Mr. Hartl told me that there had been missing tickets; that the accounting department had the numbers which corresponded to the missing tickets, although they did not have the tickets, and he asked if I would go out into the territory and try to locate these tickets,—by that, I mean sales invoices. I was familiar with the system of sales invoices that they used. Each one had a number. Mr. Hartl gave me a list of numbers. He instructed me to start in South San Francisco

(Testimony of Charles Phillip Gould, Jr.)
and to go down the Peninsula and call on Swift and Company's customers. I was familiar with that route as far as Broadway as I had worked it before. On that occasion Mr. Hartl also definitely instructed me in approaching these customers to be very careful about saying anything that would injure Swift and Company's standing with the customer. He asked me to bring back copies of these tickets if I happened to find them at the customers. He told me those numbers included the numbers of the collections on Friday of Harry Gray's route. There were some other numbers besides that.

I then started out Monday afternoon and called on the customers. I kept up the calls until Wednesday or Thursday of that week. After I completed those calls, I gave Mr. Hartl a [134] copy of the tickets that I had been able to obtain.

I saw the list which is marked Defendant's Exhibit C during the period we have been discussing. It was given me by Mr. Harbinson, in whose possession it was, sometime during that period. I turned it in to Mr. Hartl at the end of my investigation.

The first customer I called on was Pete's Grill in South San Francisco. The conversation was as follows: I told Pete that I had been sent out to check the list of numbers, that there had been some missing tickets and the company had asked me to get a copy of these tickets, and if he did not mind, I would like to see his invoices. He dug down into

(Testimony of Charles Phillip Gould, Jr.)
a cigar box and threw them onto a counter, and I went through them and he went on about his work. That was the only conversation I had with him.

In sum and substance, the conversation I had at other places was the same as with Pete. In some instances there was no conversation at all, except substantially that. Some of the customers asked me why I wanted the tickets, and in reply I explained to them that there had been these missing tickets, the company wanted to straighten out their accounts, and that I had been asked to try to get copies of these tickets.

I did not state to any of the customers that Harry Gray had failed to turn in money or that he had stolen money or any words to that effect or that he was short in his accounts. I did not say that he was short.

Referring to Guptill's Cafe in Broadway, Burlingame, I had had meals there before, but only about four or five times. As for the conversation had with Mrs. Guptill, whatever was said, she said it all to me. She asked no questions about why I wanted [135] these receipts. From what she said, I assumed she already knew. I do not remember what she said, except that she had heard about it and knew all about what I was there for. She gave me the tickets I wanted without any trouble.

The signature on the document introduced in evidence as Defendant's Exhibit A is mine. I signed it on the day when I saw Mr. Harbinson with Mr.

(Testimony of Charles Phillip Gould, Jr.)
Hogan in Sacramento. The interview took place in a luncheon place in Sacramento about the middle of the day. What was said at that time between Mr. Hogan and Mr. Harbinson was this: Mr. Hogan asked Gene about the particular case, and as Mr. Harbinson responded, Mr. Hogan wrote it down on that particular paper, Defendant's Exhibit A, and after he finished, Mr. Hogan gave it to Harbinson to read and to see if it was O.K. Mr. Harbinson said it was all right. There was some discussion about whether he would sign it. Mr. Harbinson said he did not want to be involved in the case, and he felt that if he signed anything he probably would have to be a witness, and he did not want to be down here, or have anything to do with it unless he absolutely had to, and he therefore said he would not sign it. He raised no question about the accuracy of that statement.

I was sober on that day, and Mr. Hogan certainly was sober. He gave no indication of being intoxicated. He may have had a couple of drinks. All I had was some beer.

With respect to my calls down the Peninsula, I do not recall a man by the name of Langbehn. I do recall an occasion when I called on someone in San Carlos and went with him in an automobile to obtain the tickets I desired. I did not say to that man that it seemed that Harry Gray had taken some of Swift's money just before he went on his vacation, and [136] they wanted to see just how much he had

(Testimony of Charles Phillip Gould, Jr.)
taken. I did not say that it sure looked kind of bad for Harry because it was here the day before he was supposed to go on his vacation and his cash was missing. I did not say anything to that effect. I had absolutely no feeling of ill will or desire to injury Harry Gray at any time.

Cross Examination

I recall an occasion when I had a conversation with a man whom I now suppose to have been Mr. Lengbehn. That is, I recall having called on a store and gone to somebody's house in my car with a man, but I don't know whose place it was. I don't believe when we got there he had any of the tickets I was looking for.

What I said to him when I went into the store by way of telling him what I was there about was that I was with Swift and Company, introducing myself, and that I said I was looking for tickets. I did not say Gray was short some tickets or that he had not turned in some tickets. What I said was that there were some missing tickets, and I wanted to find out where they were.

We got in a car and we rode up to a house. I don't believe we discussed the matter at all on the way. While we were at the house, we did not discuss the matter. I don't recall whether I brought him back to the store.

(Testimony of Charles Phillip Gould, Jr.)

The only thing I told him was that when I went in to the store I said I was looking for missing tickets in Gray's territory and wanted to know if he had any of them, and other than that, I did not discuss what my business was there that morning. [137]

I went to other places; after introducing myself, I told the people that I had been sent out by the company to trace some tickets, and if they wouldn't mind, I would like to see their invoices. My best recollection is that there were some who asked me why I wanted to see their tickets. In reply I told them tickets were missing; that I had this particular list which had been given to me, and I wanted to check them and that the company had to straighten out their accounts. I was not looking for just missing cash sales tags. After two days, it simmered down to cash tickets, but prior to that it had been credit tickets as well as cash tickets.

I had a list of the numbers missing; and when I went into a person to ask about tickets, I did not ask just for those the list showed were missing, but asked them for their previous two weeks' tickets, because I had numbers prior to the time in question, and I had been asked to try and find those, too, and in some cases I went through as much as a month's tickets, but I wasn't interested in tickets other than those my list showed as missing.

My list did not show the names of the purchasers on the missing tickets.

(Testimony of Charles Phillip Gould, Jr.)

Referring to the time when the statement was taken at Sacramento, Mr. Hogan, Mr. Harbinson and I were together for a period of about a half hour or forty minutes. Mr. Hogan and I had plenty of time, but Harbinson was in a hurry to get back to the ranch and didn't stay very long.

When I talked to Mrs. Guptill, she seemed to know all about this matter from somebody. You ask how the conversation came around to the discussion of what this matter was about when I was talking to Mrs. Guptill. I didn't bring it up at all. [138] She did all the questioning and answered almost all of her own questions. I told her nothing whatsoever. I was there about ten minutes. I drew the conclusion that she seemed to know all about it because she asked me what it was going to mean to Harry. She didn't know what the trouble was about and neither did I. I was trying to find out. All I knew was that there had been missing tickets, and there was money and collection blanks for that money covered by them.

I had been there in the afternoon at the plant and heard Mr. Gray claim to have put them in the cage, and Mr. Hamilton claimed they weren't there.

I did not tell Mrs. Guptill there was money that hadn't been turned in. I didn't tell her anything about the money. When I say that she seemed to know what it was all about, I do not mean that she seemed to know that money was not turned in. She never asked about that.

(Testimony of Charles Phillip Gould, Jr.)

I had known Harry Gray for quite a long while. I had roomed with him. I was personally very much interested in what I learned on this investigation trip. But it was immaterial to me what the people seemed to have said and heard about it. It was immaterial to me what had been said concerning the trouble my friend was in. I didn't care what anybody else thought. You bet your life I liked Gray and was very fond of him, and I didn't care what people were saying about him.

When that statement was taken up in Sacramento it was read by Mr. Harbinson himself. Having read it, he refused to sign it, and it was then Mr. Hogan added to what he had written the statement that appears at the bottom of the paper, "This statement taken in the presence of Mr. Chas. Gould and Mr. Hogan and the same is true and correct." [139]

I quit Swift and Company a week ago last Friday, because I had something better.

I don't recall Dorothy Kipps at all. I believe she was a waitress in Guptill's place, but I don't recall her. I had absolutely no conversation with her at all about this matter.

I want to be understood as saying that I never said to Mr. Langbehn anything about Harry Gray having taken any money or having been short when he left on his vacation. I don't recall my entire conversation with him, but I clearly recall that I did not tell him that Harry Gray had taken money before he went on his vacation and that I was try-

(Testimony of Charles Phillip Gould, Jr.)
ing to find out how much he had taken. I definitely know that I did not say anything about that.

Redirect Examination

When Mr. Hogan and I were in Sacramento in the cafe, we were there about a half hour before Mr. Harbinson came and about twenty minutes or so after he left.

I recall that I said in answer to cross-examination that I wasn't interested in what people thought about Gray. What I meant by that was this: This was the way I felt about Harry,—any trouble that he was in I knew that I could solve it,—and what anybody else said about him, it didn't mean anything to me, because I knew down inside myself that everything was all right, and I was going to find out for myself and I wasn't paying any attention to anybody else.

I don't remember the details of the conversation that I had with the several customers. It is a fact that in some cases the customers gave me the slips without asking any questions [140] about it. I do not recall how many asked me why I wanted them.

Recross Examination

I never did believe at that time or at any time that Harry Gray had been guilty of taking the money of the company.

Thereupon the defendant called as a witness on its behalf

LLOYD J. DEERING,

who testified as follows:

Direct Examination

I am employed by Swift and Company of South San Francisco, and have been with them since September, 1924. In 1934 I was the night order clerk. My office hours were 12:15 until 7:45 P. M. and generally I was there later than that three nights a week. I know Harry Gray and recall that in 1934 he was employed by Swift and Company as a truck salesman.

When Mr. Gray took over the service truck on the Peninsula, it was the custom of all drivers to turn their money into me when they came into the plant in the evening; and when Mr. Gray first took over the job he did turn his money in, but in the latter part of his employment with the company I did not receive any money from Mr. Gray.

There were other salesmen and truck drivers who turned in their money to me when they came in. When they gave me money, I counted it and made out an envelope showing the cash collection, the amount of the checks and the total collection. I typed the name of the driver or salesman on the envelope and sealed it and placed it in a strongbox in the vault. I would lock the vault when I went home.

Mr. Gray never asked me for a receipt for the money [141] he turned in. I never refused him a receipt.

(Testimony of Lloyd J. Deering.)

Cross Examination

I can't ever remember giving Harry Gray a receipt.

When money came in from any wagon driver, I did not give him a receipt acknowledging that I had received it. It wasn't the practice at that time for me to give receipts.

If Gray had asked me for a receipt signed myself acknowledging that I had gotten so much money from him, I would have given him a receipt. I had no reason to refuse to give him one. No driver ever requested a receipt of me. It is a fact that a good many of the drivers came in too late to turn their money into the cashier; and also that some of them did not turn it in to me. Among others was Harry Gray, after the first few months. But it was not a common practice for drivers not to turn in their money to me when the cashier was gone. If I was there, I accepted their money. Of course, if I wasn't there, they didn't turn it in to me. I was there at night when most of the drivers did get in. I was not always there when the drivers got in, and there were times when neither the cashier nor myself were there when the drivers got in. I don't recall refusing a receipt to Harbinson or that he ever asked for one.

At the time when I took over this night clerk's job from another clerk, I took over the duties without any instructions at that particular time to give a receipt. It was my duty to receive the money from

(Testimony of Lloyd J. Deering.)

the drivers if I was there. When they did not turn it in to me, I did not report that to my superiors. I had no authority to go to the drivers, and say, [142] "Give me the money."

I was informed that it was my duty to take the money from the drivers by the clerk that preceded me in the night order clerk's job. When I took over that job, he handed me the keys to the strongbox and the locker in the vault and told me that if I received any money from any of the salesmen or the truck drivers, I was to place it in this strongbox and the cashier would get it the next morning.

I did not have a special receipt book that I used for the purpose of giving receipts to the drivers who left money with me. I had no form of receipts.

Redirect Examination

After I leave the plant at night, there is a night watchman there all night, and he receives the money that comes in after that time from the truck drivers. I know of my own knowledge the practice that these drivers used to turn money in to the night watchman late at night.

I had observed my predecessor as night clerk taking money from the drivers. I knew that as a matter of regular practice, evening by evening, he was taking money from the truck drivers.

On an average three to six truck drivers would bring their money in, each evening, to me; it would depend on the day of the week. The drivers that

(Testimony of Lloyd J. Deering.)

turned money in to me at night were country drivers; there are certain routes on which we make deliveries on certain days of the week and not daily.

I am familiar with the form of collection report and with the fact that each page has a triplicate, consisting of a white copy, a yellow copy and a tissue. The practice with [143] respect to these salesmen who turned in their money to me and getting a receipt was this: each driver had a folder into which the collection book fits. The folder had two pockets. When the driver brought in the money, I counted it. I would make out my envelope showing the cash, checks and the total collection, with the name of the driver, and I would place the envelope in the other pocket of the folder. Then the cashier would put the receipt on the tissue when he received it. The tissue remained in the book and would be returned to the driver as his receipt.

Recross Examination

I knew that the night watchman took the money from the drivers when I wasn't there, because at times when I was going home I would meet a driver coming in who had money to turn in and would tell him to give it to the night watchman, and I know that they did, because I saw them.

Thereupon the defendant called as a witness on its behalf

HAROLD A. HARTL,

who testified as follows:

Direct Examination

I am employed by Swift and Company and have been for many years. I have held the office of auditor and office manager for about five years and occupied that position during the year 1934.

My duties as office manager are to take charge of the accounting, to have charge of the people in the accounting department, and as auditor to audit all accounts throughout the plant and customer's accounts, receive cash and so [144] forth. That includes any question of discrepancy of accounts with the salesmen.

I know Harry J. Gray. I was not present on Saturday afternoon, October 13, 1934, when he went on his vacation.

On Monday morning the cashier came to me and told me that he had not received Mr. Gray's collections for Friday. On Monday morning we then immediately checked the sales ticket numbers to see which tickets were missing from the Friday collections. In that connection we referred to what is sometimes called a "checkerboard". That is this document entitled "Daily sales ticket report." That is the form. When a salesman is given an invoice book, the pages are consecutively numbered. The salesman's name is placed at the top of one of these

(Testimony of Harold A. Hartl.)

checkerboard sheets. The sheet contains a list of numbers; as the tickets are received and go through our work we check off the numbers on the checkerboard.

On Monday morning I ascertained that certain of Gray's tickets were not received in the office. Then I called in Mr. Gould. I asked permission to use him to check these tickets, to go around among our customers to see if he could locate these tickets that corresponded with those numbers. Instructions were given Mr. Gould merely to go into the customer's store and ask if he might be permitted to look at the tickets. I told him if he found the tickets, he was to make a copy of them and bring the copy back. He subsequently brought to me a report.

I never gave any instructions to Mr. Harbinson on that subject. I never discussed the matter with Mr. Harbinson.

I recall that Mr. Gray returned from his vacation on the 29th of October. I saw Mr. Gray that day and was subsequent- [145] ly present at an interview with him. On that occasion I did not say that I had it in black and white and that he would be blacklisted if he didn't pay the money. In substance what I told him was that it wasn't a question of anything except that this money had not been turned in to us, we had not received it, and therefore any moneys collected by anyone in the employ of Swift and Company belonged to Swift

(Testimony of Harold A. Hartl.)

and Company and the were not relieved of responsibility until they had turned it in.

I told him that he knew the rules of the company, which were to turn the money into the company each night. He said in that regard that the reason why he did not do it was that he claimed he got in late, and he had certain reports to make out, and he was hungry and stopped in South San Francisco for dinner, then returned to his hotel room and made out his reports, and by that time it was too late to check in to the night clerk. I told him that we didn't accuse him of anything except carelessness, and he admitted he was careless.

Cross Examination

In our system there were also the receipt or collection pads which contained a record of the cash collected. It contained a record of the person from whom the collections had been made, and the date, number, amount of the invoice that had been given to the customers. The number of the invoice was to be entered on it, if it were filled out properly. I don't know whether the missing tickets appeared on the collection pad because we did not have the particular collection pad. The collection pad remains the property of the salesman. I never saw any collection pay that had missing numbers on it.

[146]

I never accused Mr. Gray of anything except carelessness. I never accused him of taking any

(Testimony of Harold A. Hartl.)
money and converting it or embezzling it or stealing it. The discussion I had with Mr. Gray was lengthy but all repetition. The repetition was that he was concerned and repeatedly said he wanted me to answer him as to whether I thought he took the money or not. My reply was that it wasn't a question of whether he took it or not, the question was we had not received it. He brought up the matter of Hamilton. He said he had thrown the money into the cashier's cage; that after he left the office, the next one in the office was Hamilton, and that therefore in his mind it resolved itself into the fact that somebody took the money, and that if he didn't take it, Hamilton must have. I replied that Hamilton was a trusted employee, and we couldn't entertain anything like that. I replied that we were not accusing Mr. Gray of taking the money, that we never did and were not doing it then. After he made this claim to me that he put the money in Hamilton's cage and after he claimed that it was a situation whether it was he or Hamilton and told me he thought Hamilton was the man who took the money, we made no special audit of Hamilton's accounts for the reason that there is a regular monthly audit made and filed every month, and Mr. Hamilton's accounts had just been audited within the two weeks' period following October 13th. The audits disclosed no irregularity. We never had an audit of his disclosing an irregularity until a long time afterwards. The audit that we made was thorough

(Testimony of Harold A. Hartl.)
and would have disclosed an irregularity if there had been one at the time this occurred. The discrepancy that later occurred through Mr. Hamilton occurred during a time in 1935.

Under our rules a man would be discharged of responsi- [147] bility as soon as he had turned in the money he had collected to the person who had been designated to receive it. The person designated to receive it, after the cashier had left for the day, was our night order clerk up to eight o'clock at night. Our night watchman was designated to receive it after the night order clerk had left, and at times did receive it. The form of receipt was the tissue in the collection book. The tissue is retained by the man who turns in the money as a permanent record in his book, and the book belongs to him. The person receiving the money was to count it, see that the right amount was entered on the collection pad and receipt the pad. That was one of the duties of the night order clerk. I am not sure whether I ever discussed the matter with Mr. Deering. I may have told his predecessor who then turned the night order clerk's work over to Deering and gave him the same instructions.

Referring to the Monday morning before I sent Mr. Gould out, Mr. Hamilton had come in and told me that he had not received Gray's collections for Friday, and I spent sometime checking up before Gould was sent out in the afternoon. All I knew at

(Testimony of Harold A. Hartl.)

that time was that we had missing tickets. At the time Gould went out, I had no idea what their dates were. Subsequently we found that they went back about three weeks.

In my interview with Mr. Gray after he came back from his vacation, I took him back in the vault, and let him go through the records; I told him that we had missing tickets in the middle of books, and he saw the spaces in between these ticket numbers. He asked me if he might make an investigation, and I made it with him, that is, the investigation in the office.

When the collection pad comes in, two copies are turned in from the salesman. Those copies show the name of the party [148] from whom the collection has been made, whether or not it is a check, and the amount of the cash collection. It is a record of cash collected, and it should show the number of the sales ticket. The cash collection reports are filed away as part of our cash. There was nothing over this period of three weeks that informed us of the missing tags. We had a clerk in the invoice desk who actually did the work of posting from the tickets on to the checkerboard. He was supposed to do it every day. Occasionally, as happens in all businesses, during vacation time we did not have the same class of help as relief and we occasionally get a little bit behind, and that is then caught up.

(Testimony of Harold A. Hartl.)

Redirect Examination

The receipts which we furnished were these collection report books. The books are carbonized. The tissue remains in that book as the property of the person turning in the cash as his receipt.

I never heard Mr. Kelly state that Mr. Gray was engaged in a build-up or words to that effect.

Thereupon the defendant called as a witness on its behalf

JAMES A. WHITE,

who testified as follows:

Direct Examination

I am the Pacific Coast general manager for Swift and Company. I held that position in 1934, and I have general charge of the operations of the Swift and Company on the Coast. The head office is in South San Francisco. We have there about 700 employees. In case a discrepancy occurs or a question arises [149] with respect to collections or accounts of salesmen, it falls in the department of Harold A. Hartl to investigate and pass upon that question. He held at that time the position of office manager and accounting.

The sales manager or the assistant sales manager would have no duties at all in a matter of a discrepancy of that kind.

(Testimony of James A. White.)

I recall that after Harry Gray returned from his vacation in 1934, I had a talk with him. I have a private office and a desk outside the office. I was at the outside desk, and Harry stopped at the desk and wanted the privilege to go through our records. I referred him to Mr. Hartl. That is the only conversation I had with him at the time. A very short time later he came into me again. He said he was honest and hoped I thought he was, and I told him, "Harry, I have developed enough information on this to satisfy myself that you were only careless, and we have so adjusted our records." I don't recall whether he then said anything about a job or not. It was just a short conference and he left. A few days later he came in and said something about taking care of this discrepancy and wanted to know about his job, and I said to him, "Well, I have discussed this with the sales department, and we don't think it is advisable for you to go back on your job. Harry, you go out and take a job in the plant, and I will see what we can do for you later on." He did not take the job in the plant, and I have never seen him since until now.

Cross Examination

While Mr. Gray was on his vacation, somebody told me about the discrepancy, and I just answered that Harry would [150] probably take care of it when he got back. I had given no instructions that he was to come and see me. He just stopped at my

(Testimony of James A. White.)

desk when he got back. It was not while he was away that we made the determination that when he got back that he couldn't go back on his job. After he returned he went to see Mr. Hartl. They discussed this thing, and Harry agreed to take care of the discrepancy, and Mr. Hartl came in to see me, and I said, "Well, you instruct our people in Chicago that this matter was only carelessness and that Harry Gray's record was clear and that they could put him out in the plant if they wanted to, as far as we were concerned." We didn't think it advisable for him to go back on his old job. It was carelessness, and that was our reason. I knew what the carelessness consisted of,—in not turning in his collections regularly.

Mr. Hartl came in and talked to me and said that Gray's collections had not been turned in, that they were making an investigation, and when the investigation was completed, he came and told me it developed into carelessness. I was not familiar with the details. He did not tell me that they knew where the money was. He did not tell me that Gray had taken the money. What he told me was that Harry wasn't quite sure what he did do with the money, but that Harry thought that he had put it in the cashier's cage.

I was interested in Harry because he had come to me with a recommendation from one of the managers in Edmonton, Canada, and I was interested in learning about his progress. I discussed the matter

(Testimony of James A. White.)

briefly with Mr. Hartl, and he said that Harry had taken the position that he had put it in the cashier's cage; that there was considerable running and looking about; [151] that Gray had gone back to his hotel; that he thought he might have left it there, and that they then looked through trash cans and around the office and couldn't locate it. Then Harry came to me and said he was satisfied he was careless and wanted me to give him another chance. I said that I would see that he was put on in the plant. He told me he was careless, and he considered that he was careless in that he had not turned in his collections. He did not tell me that there were many times previously when he had turned them in, just as he had turned it in this time. He did not say anything about the other drivers doing the same thing. I recall no conversation with him about Mr. Hamilton being, in his opinion, the one who had taken it. The farthest he went with me was that he thought he had put it in Hamilton's cage. He did not state that under his recollection of what he did, it was either he or Hamilton who had taken it. The only time I recall that he ever accused Hamilton was sometime later when he wrote me a letter from Los Angeles. The letter is in evidence as Defendant's Exhibit H. I don't recall any further conversations with Mr. Gray.

(Testimony of James A. White.)

Redirect Examination

When Mr. Gray told me that he thought he had put the money in the cage, I had been informed prior to that time by Mr. Hartl that Gray had gone over to his room looking for these collections. I heard that he had been looking in the room and in the trash can. That is the only recollection I have about it.

Thereupon the defendant called as a witness on its behalf

CHARLES MARTIN JOOS, JR.,

who testified as follows: [152]

Direct Examination

I live in Hayward, California. In 1934 I was living in San Mateo. I was in the meat business at that time with the Peninsula Stores. I knew Harry J. Gray, driver and salesman for Swift and Company. I did business with him. On occasions I called him "Jesse James." How I happened to call Mr. Gray Jesse James was more or less over a bottle of Coca Cola. He would come in there, and the fellow who worked with me and I would both match Mr. Gray for a bottle of Coca Cola, and naturally, if Mr. Gray had a little luck there, when we could not stick him, we would call him "Jesse James," and say, "All you need is a horse," or something like

(Testimony of Charles Martin Joos, Jr.)

that in a joking manner. I absolutely did not call him "Jesse James" after he left the employ of Swift and Company.

No one from Swift and Company ever made any remark to me disparaging to the honesty of Mr. Gray.

I once saw Mr. Gray after he had left the employ of Swift and Company. He dropped in either on Monday or Saturday morning to say goodby to me, and said he was going to Los Angeles, and I wondered why. He told me that tickets or tags were misplaced when he turned in, and that is as far as it went. We did not call him Jesse James when he came in, for the simple reason that he did not have on his frock that he had on when he was working as a salesman. He came in all dressed up, and naturally we wondered why he was dressed up, and therefore "Jesse James" was not brought up again.

He told me he was leaving Swift and Company by request.

I absolutely did not hear anyone make a remark disparaging to the honesty of Mr. Gray. [153]

I am known as "Bud" Joos.

Thereupon defendant closed its case.

The foregoing was all the evidence introduced on the trial of this cause.

Thereupon the defendant made a motion for a directed verdict as follows:

"Mr. Harrison: I move, if the Court please, that the jury be directed to return a verdict for the defendant on the ground that it appears by uncontradicted testimony that the statements here complained of are privileged in character and that it appears without contradiction that there was no actual malice, and particularly on the ground that it appears that the statements complained of were made by one who is interested in the communication to another person interested in the communication and were made by a person interested and who was requested by the person interested to give the information.

"I assign as an additional ground for a directed verdict for the defendant in this case that the uncontradicted evidence shows that the communication here involved is a privileged communication having been made by a person interested therein to another interested therein, and on the further ground that it was made in response to an inquiry, and on the ground that the uncontradicted evidence shows absence of express malice.

"And further, on the separate ground that there is no proof showing, or tending to show, that the persons who are alleged to have made the statement had authority so to do, or that they made the statements in the course of their employment, or that either of them made the statement under the authority of the defendant." [154]

Thereupon the Court denied the motion, to which ruling the defendant by its counsel then and there excepted.

Thereupon counsel presented their closing arguments to the jury.

Thereupon the Court gave the following instructions to the jury:

"Charge to the Jury.

"The Court: (Orally): Gentlemen of the Jury, this action is brought by plaintiff, Harry J. Gray, against defendant Swift & Company, to recover damages for an alleged slander. Plaintiff asks for special damages in the sum of $2000 and general damages in the sum of $50,000, a total of $52,000.

The pleadings admit that the defendant is a corporation doing business in the State of California, and that for some time prior to the 12th day of October, 1934, plaintiff had been an employee of the defendant in its packing plant in the city of South San Francisco. Plaintiff claims that on or about October 16, 1934, the defendant, through its agents or servants spoke of and concerning him certain words which are set out in the complaint. Defendant denies that it ever spoke these words, or any of them.

It is the duty of the Judge to instruct you as to the law that is applicable to this case, and it is your duty as jurors to follow the law as given to you in these instructions. On the other hand, it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose.

You are the sole judges of the effect and value of the evidence. You are not bound to decide in con-

formity with the declarations of any number of witnesses which do not pro- [155] duce conviction in your minds against a lesser number, or against a presumption of law, or evidence, which satisfies your minds. In other words, it is not the greater number of witnesses which should control you where their evidence is not satisfactory to your minds as against a lesser number whose testimony does satisfy your minds.

The testimony of one witness entitled to full credit is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses on the other side might testify to an opposite set of facts, if from the whole case the jury believes that the greater weight of the evidence, considering its reliability and the credibility of the witness, is on the side of the one witness as against the greater number of witnesses.

In civil cases such as this a preponderance of evidence is all that is required; that is, such evidence as when weighed with that opposed to it has more convincing force. In weighing the testimony you are to consider the credibility of witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. For the purpose of determining the credibility of the witness you may take into consideration their conduct, their character as shown by the evidence, their manner on the stand, their relation to the parties, if any, their interest in the case, their bias and prejudice,

if any, their degree of intelligence, the reasonableness or unreasonableness of their statements, and the strength or weakness of their recollection.

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testifies, by the character of his testimony or what [156] the witness' motive is, or by contradictory evidence. A witness false in one part of his testimony is to be distrusted in others. That is to say, you may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point, and if you are convinced that a witness has wilfully sworn falsely you must treat all of his testimony with distrust and suspicion and reject it all unless you shall be convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth.

You should not consider as evidence any statements of counsel made during the trial, unless such statements, or statement, is an admission or stipulation conceding the existence of a fact or facts. You must not consider for any purpose any evidence offered and rejected, or which has been stricken out of the record. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and the inferences which you may deduce therefrom, and such presumptions as the law may deduce therefrom, as stated in these instructions, and upon the law as given you in these instructions.

The burden of proof rests on the plaintiff to prove by a preponderance of evidence all of the affirmative allegations of the complaint, which include the allegation that defendant made the statement concerning the plaintiff to which he refers in his complaint. The term 'preponderance of evidence' is more than a mere form of words, and has a real meaning. It means that if the weight of evidence is in favor of the defendant, or if it is evenly balanced, your verdict must be in favor of the defendant as against the plaintiff.

Slander is a false and unprivileged publication other [157] than libel which charges any person with crime or tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or of imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit, or which by natural consequence causes actual damage.

Every person has, subject to the qualifications and restrictions provided by law, the right of protection from defamation. Defamation is effected by slander. There cannot be a slander, in the legal sense of the term, unless the statement made is false. A mere statement of the truth does not give rise to any cause of action, no matter how disparaging it may be.

Plaintiff alleges in his complaint that the agents or servants of defendant made a statement of and concerning him as follows:

'Harry'—meaning the plaintiff—'is short in his account with the company. He has been taking the company's money. He has collected money of the company and has not turned it in.'

The plaintiff further alleges that such words were understood by the persons to whom they were spoken to mean that the plaintiff was guilty of embezzling the funds of the defendant. The defendant denies that any such words were spoken by it. It further denies that if such words were spoken they were misunderstood by such persons to have such meaning.

I instruct you that it is for you to decide, in view of all of the evidence, whether such words, if in fact they were [158] spoken by the defendant through its agents or servants, were understood by the person to whom they were spoken as charging the plaintiff with embezzlement, or only as imputing irregularity or carelessless not amounting to a crime. If you find that, under the circumstances, such words were understood by the persons to whom they were spoken not as charging embezzlement, or any crime, but only as charging carelessness or innocent irregularity, then I instruct you that the meaning of such words would not constitute a slander, and that plaintiff would have no right to recover by reason of the fact that such words were spoken.

You are not in this case to concern yourselves with the question of whether or not the plaintiff was guilty of taking money belonging to defendant

Swift & Company. The defendant does not claim and does not allege that the plaintiff embezzled any of the money. You are not to concern yourself with the question of whether moneys belonging to the defendant were stolen, and, if so, by whom they were stolen. Those are not issues in this case. The issue in this case which you are to decide is nothing more nor less than the question of whether the defendant corporation, Swift & Company, through its agents or servants, uttered and published statements concerning the plaintiff of a nature such as to be deemed slander in law, according to the other instructions which are given you. If the defendant, through its agents or servants, did not publish any slander about the plaintiff, your verdict must be in favor of the defendant, irrespective of whether the plaintiff was innocent or guilty of embezzlement. The utterance of words, although derogatory, does not in itself constitute slander within the meaning of the law, and no damages can be recovered unless [159] there has been what the law calls publication of those words. That is to say, unless the words are communicated by the defendant to some third party, someone besides the plaintiff or the defendant itself. Where statements are made by certain officers or employees of a corporation to other officers or employees of the same corporation in the course of the company's business, and where they are not communicated to others besides the plaintiff by those speaking the words, then there is no publication of the statements by the corporation. In such

a case the company cannot be held in damages as for slander.

The defendant is not liable for every speech made by its agents or servants, but only for such statements as are made within the scope of the agent's or servant's employment, and in the performance of his duties of transacting the business of the corporation. The fact that an employee at the time he makes a derogatory remark about another happens to be engaged in performing some service for his employer is not enough to make his employer responsible for such remarks, owing to the facility and thoughtlessness with which individuals sometimes make derogatory remarks to others. If an employee of a company indulges in such conduct his remarks should not perhaps be imputed to the company as readily as acts done in more deliberate circumstances. That is, they should not be so readily considered as being within the scope of the agent's employment. In order to charge the employer, those remarks must be made in connection with the very same duties which the employee was engaged in or instructed to perform for his employer at that time. In other words, the employee must be engaged or assigned by his employer to act upon or in relation [160] to the very subject matter with which the remark is connected at the very time the remark is made, otherwise the employer cannot be held responsible. If the employee does something which he is not employed to do, instead of something which he is employed to do, his employer is not responsible for what he does.

I instruct you that a man intends the natural consequence of his acts. If, therefore, the jury believes and finds from the evidence that the natural consequence of the publication complained of was to defame and injure plaintiff in his reputation, and character, you may properly infer such was the intention of defendant.

If you find for the plaintiff you must award him damages. You must award special damages in such sum as will compensate him for any loss of income from employment if you find from the evidence that he was unable, for any period of time, to obtain employment by reason of the alleged acts of the defendant, as set forth in the complaint. The evidence shows that special damages, if any, have been proved only to the extent of $750. In addition to special damages, if any, which you may award, you may, if you find for the plaintiff, award him such general damages as will compensate him for all the detriment proximately caused to him by the acts of the defendant as alleged in the complaint. Special damages may not exceed $750, and general damages may not exceed $50,000.

In an action for slander, the law implies some damage from the uttering of actionable words, and the law further implies that the person using the actionable words intended the injury the slander is claimed to effect, and in this case if you find for the plaintiff upon that part of the complaint al- [161] leging slander you will determine from all the facts and circumstances proved what damages

are to be given him, and in assessing the damages you are not confined to any mere pecuniary loss sustained. Physical pain, mental suffering, humiliation, and injury to the reputation of character, if proved, are proper elements of damage.

With respect to the matter of damages for mental suffering, if any, you are instructed that no damages may be awarded for mental suffering which is caused merely by the accusation complained of. Before any such damages may be awarded at all it is necessary for the plaintiff to prove that the alleged damage was the direct, immediate and proximate effect of the publication or communication of the alleged charge to third parties. In other words, if you find that the plaintiff was discharged from his employment by the defendant, or even if you find that the defendant made accusations to the plaintiff, himself, you are not by reason of those facts alone to award any damages to the plaintiff.

In case you should find a verdict for the plaintiff you should not award him any amount in excess of the actual damages, if any, which you find he has sustained. In this regard I instruct you that the amount prayed for in the complaint does not furnish any criterion for the amount of your verdict. The mere fact that a plaintiff has prayed for a certain amount of damages does not confer upon him a right to recover any amount greater than the amount of the actual damages, if any, that he has suffered.

If you find for the plaintiff you must make no allowance to him for exemplary damages. That is, for the sake of example and by way of punishment. In cases of this kind it is [162] usual for the court to instruct the jury as to the rule by which they should measure damages in case they should award any. The purpose of these instructions is to advise the jury upon the law as it affects the issues made upon the trial, but the jury are not to understand because the Court instructs them on the question of damages that thereby the Court means to convey any intimation that in this action the plaintiff is or is not entitled to any damages. These instructions as to damages are meant to apply only in case the plaintiff is found to be entitled to a verdict.

You must weigh and consider this case without regard to sympathy, prejudice or passion, for or against either party to the action. It is the duty of the jurors to deliberate and consult with a view to reaching an agreement, if they can do so, without violence to their individual judgment upon the evidence under the instructions of the Court. Each juror must decide the case for himself, but should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to change his views or opinions on the case when convinced that they are erroneous. No juror should vote for either party nor be influenced in so voting, for the single reason that a majority of the jury should be in favor of said party. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the

mere purpose of returning a verdict solely because of the opinion of the other jurors.

There are submitted to you merely for your convenience two forms of verdict which are as follows: The first, after the entitlement of court and cause is: 'We the jury find in favor of the plaintiff and assess the damages against the defendant in [163] the sum of (blank) dollars,' and a place for the signature of the foreman. The other is, after the entitlement of court and cause: 'We the jury find in favor of the defendant,' Also, with a place for the signature of the foreman. Your verdict must be unanimous, and when you have arrived at a verdict it will be properly filled out and your foreman will sign it and you may return to court."

The charge to the jury above set forth comprises all the instructions given to the jury in the cause.

Of the foregoing instructions given, the following was given by the Court at the request of the plaintiff and was Plaintiff's Requested Instruction No. 6:

> "Slander is a false and unprivileged publication other than libel which charges any person with crime or tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or of imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit, or which by natural consequences causes actual damage."

Of said instructions, the following was given at the request of the plaintiff and was Plaintiff's Requested Instruction No. 10:

> "I instruct you that a man intends the natural consequence of his acts. If, therefore, the jury believes and finds from the evidence that the natural consequences of the publication complained of was to defame and injure plaintiff in his reputation and [164] character you may properly infer such was the intention of defendant."

Of said instructions, the following was given by the Court at the request of plaintiff, and was Plaintiff's Requested Instruction No. 11:

> "In an action for slander, the law implies some damage from the uttering of actionable words, and the law further implies that the person using the actionable words intended the injury the slander is claimed to effect, and in this case if you find for the plaintiff upon that part of the complaint alleging slander you will determine from all the facts and circumstances proved what damages are to be given him, and in assessing the damages you are not confined to any mere pecuniary loss sustained. Physical pain, mental suffering, humiliation, and injury to the reputation of character, if proved, are proper elements of damage."

Prior to the giving of the charge by the Court to the jury and within the time allowed by the Court

under its rules and in full conformity to those rules, the defendant objected to the giving of said plaintiff's requested instructions on the following grounds:

To plaintiff's requested instruction No. 6 for the reasons and on the grounds that

(a) The complaint raises no issue as to any type of slander except an alleged accusation of a crime, namely, embezzlement. There is no issue raised as to any other type of slander. [165]

(b) There is no evidence in the case of any alleged utterances which tend to injure the plaintiff in respect of any office, trade, profession or business, particularly with respect to imputing any general disqualification.

To plaintiff's requested instruction No. 10 for the reasons and on the grounds that:

(a) It is a question for the Court and not the jury what the meaning and consequences of words are. (See defendant's Proposed Instruction No. 5, and authorities there cited.)

(b) The present is a case of qualified privilege (see defendant's Proposed Instructions Nos. 17, 21, 24, 25, and authorities there cited). In such a case malice must be proved, and there is no presumption of intention or malice inferred (Civil Code, Section 48).

(c) Even if this were not a case of qualified privilege, which it clearly is, it would be im-

proper to charge that an intent might be presumed because in such a case, intent would be immaterial, and the requested charge would be misleading. (36 Corpus Juris, p. 1214, Section 162.)

To plaintiff's requested instruction No. 11 for the reasons and on the grounds that:

(a) Defendant objects on all the grounds stated in the objection to plaintiff's requested instruction No. 10; and also

(b) Upon the ground that plaintiff has already requested the instruction that it is slanderous to [166] make a false communication which by natural consequences causes actual damage; the present requested instruction that the law implies some damages from utterances of slanderous words is, in the circumstances, question begging;

(c) The proposed instruction refers to physical pain of which there is no evidence and for which there may be no recovery in any event;

(d) The requested instruction will permit recovery of damages in the nature of punitive damages for which there can be no recovery. (See defendant's proposed instruction No. 30.)

At the conclusion of the giving by the Court of its instructions to the jury, defendant, by its attorney, did, in the presence of the jury and before they re-

tired to deliberate upon their verdict, take exception to the following instructions:

Defendant's Exceptions to Instructions of the Court to the Jury

The defendant excepted to the instruction referred to above as Plaintiff's Requested Instruction No. 6, as it was given and read to the jury, for each of the reasons stated above in defendant's objection to said instruction.

The defendant excepted to the instruction referred to above as Plaintiff's Requested Instruction No. 10, as it was given and read to the jury, for each of the reasons stated above in defendant's objection to said instruction.

The defendant excepted to the instruction referred to above as Plaintiff's Requested Instruction No. 11, as it was given and read to the jury, for each of the reasons stated [167] above in defendant's objection to said instruction.

The defendant, prior to said charge to the jury, and prior to the argument of counsel, and within the time allowed by the rules of said Court, and in full conformity to said rules, presented to the Court and requested the Court to give to the jury each of the following written instructions:

Instructions Requested by Defendant

Defendant's Proposed Instruction No. 5, reading as follows:

"The meaning of the language used in an alleged defamatory publication is in the first

instance a question for the Court to decide. Where language is unambiguous, it is the province of the Court to determine its construction and to determine whether it is capable of the defamatory meaning which the plaintiff claims for it. The plaintiff claims that the defendant said of him that 'Harry (meaning the plaintiff) is short in his accounts with the company.' The Court has considered these words, and it concludes that these words do not mean and are not reasonably capable of being understood to mean that plaintiff has been guilty of embezzling funds of the defendant entrusted to his care as an employee of defendant. I therefore instruct you that even if you find that the defendant spoke those words of plaintiff, nevertheless it cannot be guilty of slander, and you cannot render a verdict against the defendant on account of those words."

Defendant's Proposed Instruction No. 6, reading as fol- [168] lows:

"The plaintiff claims that the defendant said of him that 'He (meaning the plaintiff) has collected money of the company and has not turned it in.' The Court has considered these words, and it concludes that these words do not mean and are not reasonably capable of being understood to mean that plaintiff has been guilty of embezzling funds of the defendant entrusted to his care as an employee of defendant. I therefore instruct you that even if

you find that the defendant spoke those words of plaintiff, nevertheless it cannot be guilty of slander, and you cannot render a verdict against the defendant on account of those words."

Defendant's Proposed Instruction No. 12, reading as follows:

"Even if you find that the alleged remarks were made by some employee of the defendant and further that the employee had been sent out by the defendant to check the plaintiff's route, that is, to ascertain what sales had been made and what moneys had been collected by the plaintiff, nevertheless, it would not be part of the employee's duties nor connected with his assignment to utter the remarks complained of, and defendant cannot be held liable on account of such remarks."

Defendant's Proposed Instruction No. 14, reading as follows:

"The law does not hold an employer liable [169] for every defamatory utterance of an employee. It does not hold an employer responsible for every reckless, thoughtless or even deliberate speech made by an employee concerning or relating to other persons while he is in his employer's service."

Defendant's Proposed Instruction No. 16, reading as follows:

"If you find that some employee of the defendant uttered the alleged derogatory re-

marks concerning the plaintiff, that is not enough to make defendant responsible. If the employee who made such remarks was a salesman on a route, that fact would not by itself authorize him to speak for the defendant on the subject of the plaintiff and would not make the defendant responsible for any such remarks concerning the plaintiff, and if the employee did make such remarks in the circumstances described, they are his own responsibility."

Defendant's Proposed Instruction No. 17, reading as follows:

"Sometimes remarks are made in circumstances and on occasions which the law calls 'privileged.' If a remark is made on a privileged occasion, then even though it is not true and is defamatory, nevertheless it is not regarded as slanderous, and there is no liability unless the words were spoken maliciously, that is to say, with actual malice. If a statement or remark is made without malice by a person interested therein to another person interested therein, it is a privileged publication." [170]

Defendant's Proposed Instruction No. 18, reading as follows:

"If a remark, although not in fact substantiated in truth, is made in good faith and in an honest belief that it is true and without any desire or disposition to injure the party of

whom it is spoken and without any spite or ill will toward him, then it is not malicious, and if the occasion is privileged, there is no liability."

Defendant's Proposed Instruction No. 19, reading as follows:

"If a remark is made on a privileged occasion, the burden of proof is upon the plaintiff to establish by a preponderance of evidence that it was made with actual malice. If plaintiff fails to prove that such remark was made with actual malice, the verdict must be for the defendant and against the plaintiff."

Defendant's Proposed Instruction No. 20, reading as follows:

"In determining whether or not a communication to a person interested therein by one who is also interested is made without malice, malice is not to be inferred from the mere fact of communication."

Defendant's Proposed Instruction No. 21, reading as follows:

"Where the facts and circumstances under which an alleged defamatory publication is made are undisputed, the question of privilege is one for the Court. Even if you should find that the defendant uttered of [171] the plaintiff the words set out in the complaint, the circumstances under which they were said are

undisputed. The Court has considered the matter and instructs you that the occasions were privileged and that if the words were uttered without actual malice (if, in fact, there were any words said), then your verdict must be in favor of defendant and against the plaintiff."

Defendant's Proposed Instruction No. 22, reading as follows:

"Where a plaintiff seeks to hold a corporation liable for remarks made by an employee, the corporation cannot be held responsible for the actual malice of the employee, if there was any, unless it had expressly authorized the employee to slander the plaintiff maliciously, or knowing that he uttered a slander maliciously, authorizes and approves what he said. Consequently, if the occasion of an utterance is privileged within the meaning of the instructions already given to you, a corporation cannot be held liable for utterances of an employee unless first, those utterances were made with actual malice, and in addition, the corporation had expressly authorized the employee beforehand to make the utterance maliciously or thereafter approved of the utterance, knowing of its falsehood."

Defendant's Proposed Instruction No. 23, reading as follows:

"There is no evidence whatever that the de-
[172] fendant corporation ever expressly

authorized any employee to utter any of the remarks referred to in the complaint or ever approved of any such utterances, and I therefore instruct you that even if some employee did utter such remarks, no actual malice can be charged to the corporation. You will therefore return a verdict in favor of defendant and against the plaintiff."

Defendant's Proposed Instruction No. 24, reading as follows:

"If an employee of the defendant was sent out by the defendant to interview customers on the plaintiff's route for the purpose of checking up to ascertain what sales the plaintiff had made and what moneys he had collected, if any, then even if you should find that while engaged in that task such employee made the remarks referred to in the complaint to a customer, I instruct you that if the employee acted in good faith and in an honest belief that what he said was true and without any desire or disposition to injure the plaintiff and without any spite or ill will toward him, the remarks were privileged, and even if they were false and derogatory, the defendant cannot be held guilty of slander, and the plaintiff is not entitled to recover damages because of such remarks."

Defendant's Proposed Instruction No. 25, reading as follows:

"A communication, though in fact unfounded in truth, is privileged if made in good faith in

the [173] performance of any duty and with a fair and reasonable purpose of protecting the interests of the person making it or the interests of the person to whom it is made. I therefore instruct you that even if you find that the defendant uttered concerning the plaintiff the words complained of, yet if you find that those words were said in good faith in carrying out the company's business and with a fair and reasonable purpose of protecting the interests of the company, then the defendant cannot be held liable even though what was said was not well founded in fact."

Defendant's Proposed Instruction No. 26, reading as follows:

"Even if you find that some employee of the defendant, while checking the plaintiff's route, made an utterance concerning the plaintiff, as he alleges in the complaint, and even if you find that the utterance was false and made with actual malice, nevertheless you cannot hold the defendant corporation liable for such remarks, if any, unless such employee had been expressly ordered beforehand to go out and make the remark or afterwards the corporation learned that such a remark had been made and approved of it with knowledge of its falsehood."

Defendant's Proposed Instruction No. 27, reading as follows:

"There is no evidence whatever in this case that the defendant corporation ever expressly [174] authorized any employee to utter any of the remarks referred to in the complaint or ever approved of any such utterances, and I therefore instruct you that even if some employee did utter such remarks, no actual malice is chargeable to the corporation. Consequently, in the event you find that such utterances, if there were any, were made on a privileged occasion as has been explained to you, your verdict must be in favor of the defendant and against the plaintiff."

Defendant's Proposed Instruction No. 28, reading as follows:

"Even though you find that the defendant made the statements with respect to the plaintiff alleged in the complaint, nevertheless if you further find that the defendant was interested therein and that such statements were made by the defendant in a communication, without malice, to a person interested therein, I instruct you that the publication is a privileged one and that your verdict must be for the defendant. In determining whether or not the communication is privileged, you may consider all the facts and circumstances surrounding the transaction in order to determine whether or not the defendant was interested in the communication and whether or not the persons to whom the communication was made were also interested therein."

Defendant's Proposed Instruction No. 33, reading as [175] follows:

> "I instruct you that the defendant corporation, Swift and Company, cannot be held responsible for any utterances made or alleged to have been made by Mr. Harbinson. The Court finds that the evidence does not establish that Mr. Harbinson, if he made any of the alleged utterances, was acting within the course or scope of his employment."

Defendant's Proposed Instruction No. 34, reading as follows:

> "I instruct you that the defendant corporation, Swift and Company, cannot be held responsible for any utterances made or alleged to have been made by Mr. Gould. The Court finds that the evidence does not establish that Mr. Gould, if he made any of the alleged utterances, was acting within the course or scope of his employment."

The Court refused each and all of said instructions as requested by the defendant.

Thereupon, after the Court gave its instructions to the jury, the defendant, in the presence of the jury, and before they retired to deliberate upon their verdict, again requested the Court to give to the jury each of the defendant's requested and pro-

posed instructions quoted above, namely, defendant's Proposed Instructions Nos. 5, 6, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 33 and 34, and defendant made said request as to each of said instructions severally.

The Court thereupon refused to give any of said in- [176] structions, and thereupon the defendant, by its attorney, in the presence of the jury and before they retired to deliberate upon their verdict, did except to the ruling of the Court in refusing to give to the jury said Defendant's Proposed Instructions Nos. 5, 6, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 33 and 34, taking exception severally to the refusal of each instruction.

Thereupon the jury retired to consider their verdict, and subsequently, on March 4, 1938, the jury returned into Court with a verdict in favor of plaintiff and against the defendant and assessing the plaintiff's damages at $1750.00.

Thereupon the defendant, by its counsel, on March 4, 1938, and before judgment had been entered upon the verdict, moved for judgment notwithstanding the verdict as follows:

"Mr. Harrison: I move for judgment in favor of the defendant, notwithstanding the verdict, on the grounds stated in support of my motion for a directed verdict, to wit, that the uncontradicted evidence in this case shows that any communications made were those of a privileged nature, by a per-

son interested therein to another person interested therein, without malice; secondly, on the ground that any communications made were not made by the defendant or by anyone authorized by the defendant, and that no communication was made by anyone within the scope of his authority."

Thereupon the Court denied said motion for judgment notwithstanding the verdict, and to said ruling the defendant then and there excepted.

Thereafter, on March 11, 1938, the Court made and entered its order extending time for preparation of the bill of exceptions as follows: [177]

"(Title of Court and Cause)

Order Extending Time For Preparation of Bill of Exceptions.

Good cause appearing therefor, it is hereby ordered that the defendant, Swift and Company, may have to and including March 29, 1938, within which to prepare and lodge a draft of bill of exceptions.

Dated: March 11, 1938.

A. F. ST. SURE
United States District Judge."

Thereafter, on March 26, 1938, the Court made its order further extending time for preparation of bill of exceptions as follows:

"(Title of Court and Cause)

Order Extending Time For Preparation of Bill of Exceptions.

Good cause appearing therefor, and it appearing that defendant has not yet received from the court reporter a complete copy of the reporter's transcript of the proceedings, it is hereby ordered that the defendant, Swift and Company, may have to and including April 12, 1938, within which to prepare and lodge a draft of bill of exceptions.

Dated: March 26, 1938.

A. F. ST. SURE
United States District Judge."

Now, Therefore, in furtherance of justice, the defendant herein presents the foregoing as its bill of exceptions [178] in this case on appeal from the judgment herein, and prays that the same may be settled and allowed, and signed, certified and filed as provided by law.

And plaintiff requests that there be included in this bill of exceptions such additional order or orders as may be made pertaining to the bill or pertaining to settlement or amendment thereof or pertaining to the time or term in which such bill of

exceptions may be served, signed, allowed or approved.

Dated: April 5, 1938.

MAURICE E. HARRISON
T. L. SMART
MOSES LASKY
BROBECK, PHLEGER & HARRISON
Attorneys for Defendant.

I, the undersigned United States District Judge, who presided at the trial of the above-entitled cause, do hereby certify that the foregoing bill of exceptions contains all of the material facts, matters, things, proceedings, objections, rulings, and exceptions thereto, occurring upon the trial of said cause, including all evidence adduced at the trial. And I hereby settle and allow the bill of exceptions as a full, true and correct bill of exceptions in this cause and order the same filed and made a part of the record herein. [179]

I further certify that under Rule 8 of the Rules and Practice of the United States District Court for the Northern District of California, the term of the Court within which the making and filing of the above bill of exceptions is to be done was extended to June 4, 1938; that the foregoing bill was served and lodged on April 6, 1938, within the time allowed by orders of this Court extending the time

therefor, and that it was duly presented, settled, allowed and filed within the time prescribed for that purpose and within the term.

Dated: April 28, 1938.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Apr. 28, 1938. [180]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the above Court:

Sir:

Please issue for transmission to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a certified copy of the record in the above cause, pursuant to an appeal allowed in the above entitled cause, and include in such transcript of record the following papers:

1. Complaint (filed originally in the Superior Court of the State of California, in and for the County of Sacramento, No. 53148 in the files of that Court);
2. Petition for removal;
3. Undertaking on removal;
4. Notice of filing petition and undertaking on removal;
5. Answer;

6. Verdict;
7. Judgment;
8. Petition for appeal and annexed affidavit of mailing petition for appeal;
9. Order allowing appeal and for cost and supersedeas bond;
10. Assignment of errors and annexed affidavit of mailing assignment of errors:
11. Cost and supersedeas bond on appeal and annexed affidavit of mailing cost and supersedeas bond on appeal;
12. Citation on appeal; [181]
13. Engrossed bill of exceptions;
14. Clerk's certificate to transcript of record on appeal;
15. This praecipe and annexed affidavit of mailing praecipe for transcript and order allowing appeal.

Dated: April 6, 1938.

MAURICE E. HARRISON
T. L. SMART
MOSES LASKY
BROBECK, PHLEGER & HARRISON
Attorneys for Defendant

[Endorsed]: Filed Apr. 6, 1938. [182]

AFFIDAVIT OF MAILING PRAECIPE FOR TRANSCRIPT AND ORDER ALLOWING APPEAL, ETC.

State of California,
City and County of San Francisco—ss.

George Helmer, being first duly sworn, deposes and says:

That he is a citizen of the United States and a resident of the City and County of San Francisco, State of California; that he is over the age of 18 years and not a party to the above-entitled action;

That Messrs. Brobeck, Phleger & Harrison and T. L. Smart, Esq., the attorneys for the defendant, have their offices in the City and County of San Francisco, State of California; that John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, the attorneys for the plaintiff, have their offices in the County of Sacramento, State of California, in the Capital National Bank Building in the City of Sacramento; that there is a daily service by United States mail at the City of Sacramento and that there is a regular communication by mail between the City and County of San Francisco and the City of Sacramento;

That on the 6th day of April, 1938, in the City and County of San Francisco, affiant deposited in the United States mail a sealed envelope, with postage thereon fully prepaid, addressed to John M. Welsh, Esq. and Messrs. Butler, Van Dyke &

Harris, Capital National Bank Building, Sacramento, California; that said envelope contained a copy of the attached Praecipe for Transcript; that on the 2nd day of April, 1938, in the City [183] and County of San Francisco, affiant deposited in the United States mail a sealed envelope, with postage thereon fully prepaid, addressed to John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, Capital National Bank Building, Sacramento, California; and that said envelope contained a copy of the Order Allowing Appeal and for Cost and Supersedeas Bond filed herein on April 1, 1938.

GEORGE HELMER

Subscribed and sworn to before me this 6th day of April, 1938.

[Seal] EUGENE P. JONES

Notary Public in and for the City and County of San Francisco, State of California. [184]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL

I. Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 184 pages, numbered from 1 to 184, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Harry J. Gray, vs. Swift and Company, a corporation, No. 1394 Law, as the same now remain on file and of record in this

office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Thirty-four and 85/100 ($34.85) Dollars, and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of May, A. D. 1938.

[Seal] WALTER B. MALING,
Clerk,
By F. M. LAMPERT,
Deputy Clerk. [185]

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States of America:

To Harry J. Gray, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, with- [186] in thirty (30) days of the date hereof, pursuant to an order allowing an appeal of the United States District Court for the Northern District of California, in an action

wherein Swift and Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, this 1st day of April, A. D. 1938.

A. F. ST. SURE
United States District Judge

Due service and receipt of a copy of the within Citation on Appeal is hereby admitted, this 5th day of April, 1938.

JOHN M. WELSH
BUTLER, VAN DYKE & HARRIS
Attorneys for Plaintiff

[Endorsed]: Filed April 6, 1938. [187]

[Endorsed]: No. 8843. United States Circuit Court of Appeals for the Ninth Circuit. Swift and Company, a Corporation, Appellant, vs. Harry J. Gray, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed, May 20, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.